J Hall's 1795 -

A

SYSTEM

OF THE

LAW

OF

MARINE INSURANCES,

WITH THREE CHAPTERS

ON

BOTTOMRY; ON INSURANCES ON LIVES;

AND ON

INSURANCE AGAINST FIRE.

THE THIRD EDITION.

BY JAMES ALLAN PARK, ESQ.

OF LINCOLN'S INN,

BARRISTER AT LAW.

Lex (de quâ agimus) *est fons æquitatis.* CICERO.

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TO

THE RIGHT HONOURABLE

WILLIAM, EARL OF MANSFIELD,

Lord Chief Juſtice of the Court of King's Bench. &c. &c. &c.

MY LORD,

THE honour you have done this Work, by ſuffering ſuch parts of it as you have ſeen to paſs without cenſure, makes me deſirous of offering it to the Publick, under your Lordſhip's protection.

WHEN the many admirable improvements, which you have made in that branch of law which relates to Inſurances, are conſidered, any treatiſe upon the ſubject muſt be admitted to be the excluſive property of your Lordſhip. Your labours in this reſpect, were there no other cauſe, would be ſufficient to render your Lordſhip immortal in a country, whoſe grandeur is founded on commerce; and your extenſive knowledge, joined to an unwearied application to every part of commercial juriſprudence, during a long and a glorious career in the adminiſtration of juſtice, has endeared your Lordſhip's name to the Merchants of *London*, has made it the boaſt of *Britain*, and the admiration of *Europe*.

BUT while I thus only repeat the ſentiments, which the publick entertain of your Lordſhip's abilities and virtues, let me not forget to expreſs my grateful and heartfelt acknowledgments for the attention with which you have honoured me, by allowing me to preſent this Book to the world, under the ſanction of a name ſo revered as your Lordſhip's; and of giving me this opportunity of declaring that I am, with the moſt profound reſpect and veneration,

MY LORD,

Your Lordſhip's

Moſt obedient

and obliged humble ſervant,

JAMES ALLAN PARK.

CAREY-STREET, LINCOLN'S INN,
November 6, 1786.

THE

PREFACE

TO THE FIRST EDITION.

WHEN a man preſumes to ſolicit publick notice for any work of a literary nature, the world have a right to know the motives, that induced him to write, and upon what foundation he builds his claim to their attention. Notwithſtanding the number of caſes, which have of late years been determined in the *Engliſh* courts of juſtice upon the law of inſurance, and the uniformity of principle, which pervades them all; yet the doctrine of inſurances is not fully known or underſtood. This in ſome meaſure happens from the deciſions upon the ſubject being ſcattered in the various books of reports, according to the order of time, in which they were determined; and the connexion of which, from the nature of thoſe publications, cannot be preſerved. As many perſons cannot ſpare time, and few will take the trouble, to collect the caſes into one point of view; and as all caſes of inſurance muſt neceſſarily be attended with a number of facts, it is not to be wondered at, if from a curſory, inattentive, unconnected peruſal of them in a chronological order, a great part of the world ſhould remain unacquainted with the true principles of inſurance law. No book that I have met with in the *Engliſh* language, has ever yet attempted to form this branch of juriſprudence into a ſyſtematick arrangement, or to reduce the caſes to any fixed, or ſettled principles.

Convinced of the utility of ſuch a work, I thought I could not employ my time more advantageouſly to my profeſſion or myſelf; nor better expreſs that reſpect which I, in common with every lawyer, feel for the venerable magiſtrate, to whom this work is inſcribed, and for the other learned judges, who have aſſiſted in erecting this fabrick, than by extracting all the caſes upon this ſubject from the maſs of other learning, with which they lie buried in the reporters; and thereby endeavouring to prove to the world that the doctrine of inſurance now forms a ſyſtem as complete in every reſpect as any other branch of the *Engliſh* law. Could any other incitement have been requiſite, the opinion of Mr. Juſtice *Blackſtone* would have had conſiderable weight. "The learning relating to marine inſurances," ſays that elegant commentator (*a*) has of late years been

(*a*) 2. *Black Com*, 460.

" greatly improved by a ſeries of judicial deciſions, which " have now eſtabliſhed the law in ſuch a variety of caſes, " that (if well and judiciouſly collected) they would form a " very complete title in a code of commercial juriſprudence." Urged by theſe motives, I was induced to undertake this work, which is now preſented to the world.

No ſubject can be properly underſtood, unleſs the materials be methodically arranged; and therefore the firſt object I had in view was to fix upon certain heads, which would be ſufficient to comprehend all the law upon inſurances. For this part of the work I alone am accountable, the deſign being entirely my own. It may however, in ſome degree abate the ſeverity of cenſure to recollect, that in the arrangement of the ſubject I had no example to follow, no guide to direct me; and I was left entirely to the impulſe of my own judgment. But to enable the profeſſion to judge of the nature of my plan, I will ſtate the reaſons that influenced me in the mode I have adopted.

As the policy is the foundation, upon which the whole contract depends, I have begun with that, and endeavoured to ſhew its nature and its various kinds; and I have alſo pointed out the requiſites which a policy muſt contain, their reaſon and origin, as they are to be collected from decided caſes, or the uſage of merchants. When we have aſcertained the nature of a policy, the next object is to diſcover by what general rules courts of juſtice have guided themſelves in their conſtruction of this ſpecies of contract. It is then neceſſary to deſcend to a more particular view of the ſubject, and to fix with accuracy and preciſion thoſe accidents, which ſhall be deemed loſſes within certain words uſed in the policy. Thus loſſes by perils of the ſea; by capture; by detention; and by barratry; will be a material ground of conſideration. When a loſs happens, it muſt either be a partial, or a total loſs; and hence it becomes neceſſary to aſcertain in what inſtances a loſs ſhall only be deemed partial, in what caſes it ſhall be conſidered as total; and how the amount of a partial loſs is to be ſettled: hence alſo ariſes the doctrine of average, ſalvage, and abandonment. Theſe points therefore will be the next object of attention.

Having conſidered the various inſtances in which the underwriter will be liable upon his policy, either for a part, or for the whole amount, of his ſubſcription; we ſeem to be naturally led to the conſideration of thoſe caſes, in which the underwriter is releaſed from his reſponſibility. This may happen in ſeveral ways: For ſometimes the policy is void from the beginning, on account of fraud; of the ſhip not being ſeaworthy; or of the voyage inſured being prohibited. There are alſo caſes, in

in which the inſurer is diſcharged, becauſe the inſured has failed in the performance of thoſe conditions, which he had undertaken to fulfil; ſuch as the non-compliance with warranties; and deviating from the voyage inſured: Theſe and many other points of the ſame nature occupy ſeveral chapters.

When the under-writer has never run any riſk, it would be unconſcionable that he ſhould retain the premium: Therefore after conſidering thoſe inſtances, in which this is the caſe, it is natural next to aſcertain in what caſes the underwriter ſhould retain, and in what caſes he ſhould return the premium.

It would be in vain to tell a man, that he was entitled to the aſſiſtance of the law, and that his caſe was equitable and right, without pointing out in what *forum*, and by what mode of proceeding he ſhould ſeek a remedy. I have endeavoured to point out the proper tribunal, to which a perſon injured is to apply; the mode of proceeding, which he is to adopt; and the nature of the evidence he muſt adduce to ſubſtantiate his claim, with reſpect to this contract: After the diſcuſſion of marine inſurances, I have added three chapters upon ſubjects, which, though they do not form a part of the plan, are ſo materially connected with it in the rules and principles of deciſion, that it ſeemed to me the work would be deficient without them: Theſe are, bottomry and reſpondentia, inſurances upon lives; and inſurances againſt fire.

When I planned this work, I ientended to prefix an introduction, containing a ſhort, hiſtorical account of the riſe and progreſs of inſurances in this country only. But, upon the ſuggeſtion of one, to whoſe opinion I bow with deference, and whoſe judgment will always command obedience; I was induced to enlarge my deſign. The reader will now find a ſhort account of ſuch of the antient maritime ſtates, as have promulgated any ſyſtem of naval juriſprudence; and alſo, of the progreſs of marine law among the various ſtates of *Europe*. I have endeavoured to trace the origin of inſurance to its ſource; to point out thoſe countries in which it has flouriſhed, and the progreſs and improvement of it in our own. Such is the arrangement, which I have adopted, and on the propriety of which, the world and the profeſſion are to decide.

As to the mode of treating the ſubject, it will be proper to obſerve, that at the head of each chapter, I have ſtated the principles, upon which the caſes on that point depend; and then have quoted the caſes themſelves to ſhew, that they are agreeable and conſonant to the principles advanced. If there are any caſes, which ſeem to differ from the others, I endeavour to prove, either that they depend upon different principles, or that there are circumſtances in them, which make them exceptions to the general rules. In quoting caſes, I have

been careful minutely to ſtate all the circumſtances, and alſo the opinion of the court without any alteration, or comments of my own; convinced that the utility of a work of this kind conſiſts in the true and accurate account of what the law is, not in idle ſpeculations of a private man, as to what the law ought to be. Beſides, one main purpoſe of ſuch a compoſition is, to ſave the profeſſors of the law the trouble of turning over vaſt volumes of reports, by collecting into one book, all the caſes upon a particular ſubject.

But, unleſs the caſes are fully and faithfully reported, recourſe muſt ſtill be had to the original reporters, and the end of ſuch a compilation is defeated. At the ſame time it ought to be obſerved, that ſometimes, though not very often, ſeveral different points ariſe in one cauſe; and then in order to preſerve the ſyſtem complete, it is neceſſary to ſeparate them, and to aſſign to each its proper place. But ſtill the opinion of the court is given fully on each of the points; and a reference is made from one part of the caſe to the other.

I had it in contemplation to have had a diſtinct chapter for the conſideration of the law relative to this ſpecies of contract in other countries of *Europe*. But upon reflecting that inſurances are founded upon the great principles of natural juſtice, rather than upon any municipal regulations; and that conſequently the law muſt be nearly the ſame in all countries, I relinquiſhed the idea. Beſides, I have throughout the work, which ſeemed to be a better plan, taken notice in what reſpects the poſitive inſtitutions of other maritime ſtates agree or diſagree with thoſe of our own: A plan, which ſerves to illuſtrate and confirm the *Engliſh* ſyſtem.

It remains to ſpeak of the materials I have uſed. Conſcious that the value of a law book depends upon the purity and excellence of the ſources, from which its contents are taken, I have never advanced any poſition, without referring to the book, in which it was found; unleſs it be upon ſome unſettled point, where I have ſtated the arguments that may be adduced on both ſides, and left it to the reader to form his own concluſions. In my reſearches upon this occaſion, I have conſulted every foreign author that I could poſſibly obtain; and have made as much uſe of their labours, as the nature of the plan would admit.

With reſpect to the deciſions of the *Engliſh* courts of juſtice, I believe I have not omitted a ſingle caſe, that ever has appeared in print upon the ſubject: Beſides which, this collection contains a great number of manuſcript caſes, of which ſome have been determined at *Niſi Prius* only, and many have been the ſubject of deliberation in court upon caſes reſerved, or upon motions for new trials. For the latter, I myſelf am chiefly reſponſible, and upon ſome future occaſion, I ſhall be happy to correct any errors, which they may contain; as moſt of them were taken while I

was

was a ſtudent, merely for my private uſe, without any view to future publication. I have, however, by comparing them with ſuch notes as I could obtain, done every thing in my power to render them worthy of the attention of the profeſſion. As to the *Niſi Prius* notes, I am indebted for them to the very liberal and generous communications of my young profeſſional friends; and to ſome alſo of thoſe, who are in the firſt rank at the bar. Indeed, to name any one would be an injuſtice to the reſt; and therefore, I muſt beg they will accept my general acknowledgments. I ſhould, however, be undeſerving of that attention and aſſiſtance with which I have been honoured, were I to omit this opportunity of returning my ſincere and grateful thanks to Mr. *Juſtice Buller*, whoſe abilities are only equalled by his eaſineſs of acceſs, his ready and liberal communication of that knowledge, which is the natural reſult of ſuch talents, and ſuch unwearied application to ſtudy. The many valuable hints I have received from that learned judge, will no doubt contribute much to the utility of this work.

To thoſe who are much engaged in the labours of the profeſſion, a full and complete table of the principal matters is of the utmoſt conſequence. I have uſed my endeavours to render this part of the work as uſeful as poſſible, by ſtating each point under all the heads, that will naturally be reſorted to for the ſolution of any doubt.

Having thus explained the nature of my arrangement, the mode which I have adopted in the diſcuſſion of each chapter, and the ſources from which my information is derived, I preſent this volume to the public. The utility and neceſſity of ſuch a work are univerſally acknowledged; the attempt is therefore deſerving of ſome praiſe, and for the defects in the execution, I throw myſelf upon the candour of my profeſſion. The ſubject was noble, and required greater talents than mine, to treat it as it deſerved; but if I ſhall have at all done juſtice to the great abilities of thoſe diſtinguiſhed characters, whoſe names appear in every page, I ſhall in ſome meaſure have attained the object of my wiſhes, and ſhall have the pleaſure of reflecting, that the time I ſpent in the compoſition of this work, has been at leaſt productive of much perſonal ſatisfaction and improvement.

PREFACE

TO THE SECOND EDITION.

I Cannot omit the opportunity, which the publication of a Second Edition affords me, of expreſſing my acknowledgments for the very favourable and candid reception, with which the Syſtem of Marine Inſurances was honoured, on its firſt appearance by thoſe of my own profeſſion, and by the Mercantile World. Their approbation has made me anxious, upon the preſent occaſion, to render the work ſtill more deſerving of publick attention, by correcting thoſe errors, which have been pointed out by ſeveral judicious friends, or which my own obſervation has ſince ſuggeſted to my notice; and alſo by inſerting ſuch additional caſes, as have been determined in Weſtminſter Hall, ſince the former edition was publiſhed.

Since that period, Mr. Millar, an advocate at Edinburgh, has favoured the world with a work, entitled "*Elements of the Law relating to Inſurances*," which, in addition to copious abſtracts of the Engliſh caſes, contains the deciſions of the Court of Seſſion in Scotland. I once intended to have made conſiderable uſe of Mr. Millar's book, by referring to the adjudged caſes of the court, in which he practiſes, by way of illuſtration. But as thoſe caſes muſt have been introduced merely to illuſtrate, and as this volume has already ſwelled to a conſiderable ſize, I have been induced to forego my deſign; and muſt content myſelf with referring the reader, who may be deſirous of peruſing the deciſions of the learned Judges of the Court of Seſſion, to Mr. Millar's excellent publication.

J. A. P

CAREY-STREET, FEBRUARY 1790.

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* THE * P. i

INTRODUCTION.

WHEN we conſider the wonderful effects, which commerce has produced on the manners of men, when we obſerve that it tends to wear off thoſe prejudices which give birth to diſſenſions and animoſities, that it unites mankind by the ſtrongeſt of all ties, the deſire of ſupplying mutual wants; and that it diſpoſes them to peace and concord, by eſtabliſhing in every community an order of men, whoſe intereſt it is to preſerve public tranquillity; we are led to think that the hiſtory and progreſs of it would not only be amuſing, but highly important and inſtructive to the inhabitants of every civilized ſociety Such a work would be in fact the hiſtory of the intercourſe and communication of mankind, and muſt neceſſarily abound in events the moſt intereſting to every ſocial being, but particularly ſo to the people of this country, whoſe great importance in the eyes of *Europe* originated in commerce, and will endure no longer than whilſt the ſame attention continues to be paid to her commercial intereſts. In a diſſertation upon commerce, Inſurances form a very diſtinguiſhed part, and therefore it cannot but be agreeable to the ſcholar as well as to the lawyer, to trace this branch of commercial law to its ſource, and to give ſome account of thoſe various nations, which have been rendered famous by the extent of their commerce, and by the * excellency of their maritime regulations. Indeed, in tracing the origin of Inſurances, an account of the maritime ſtates that have exiſted in the world, neceſſarily forms a part of the enquiry. * P. ii.

Inſurance then is a contract by which the inſurer undertakes, in conſideration of a premium equivalent to the hazard run, to indemnify the perſon inſured againſt certain perils or loſſes, or againſt ſome particular event. When inſurance is generally mentioned by profeſſional men, it is underſtood to ſignify marine inſurances. It is in this light we are at preſent to conſider it; and from the preceding definition it appears to be a contract of indemnity againſt thoſe perils, to which ſhips are expoſed in the courſe of their voyage from one place to another. The utility of this ſpecies of contract in a commercial country is obvious, and has been taken notice of by very diſtinguiſhed writers upon commercial affairs. Inſurances give great ſecurity to the fortunes of private people, and by dividing amongſt many that loſs, which would ruin an individual, make it fall light and eaſy 2 Blackſt. Comm. 458. 3 Smith's Wealth of Nations, p. 148. Oct. ed.

1 Magens. 2 eaſy upon the whole ſociety. This ſecurity tends greatly to the advancement of trade and navigation, becauſe the riſk of tranſporting and exporting being diminiſhed, men will more eaſily be induced to engage in an extenſive trade, to aſſiſt in important undertakings, and to join in hazardous enterpriſes; ſince a failure in the object will not be attended with thoſe dreadful conſequences to them and their families, which muſt be the caſe in a country where inſurances are unknown. But it is not individuals only that derive advantages from the encreaſe of commerce, the general welfare of the public is alſo promoted. It is an obſervation juſtified by experience, that as ſoon as the commercial ſpirit begins * to acquire vigour, and to gain the aſcendant in any ſociety, we immediately diſcover a new genius in its policy, its alliances, its wars and negociations. No nation, that cultivated foreign commerce, ever failed to make a diſtinguiſhed figure on the theatre of the world, as the hiſtory of the ancients ſufficiently proves, and in proportion as commerce made its way into the various ſtates of *Europe*, they turned their attention to thoſe objects, and aſſumed thoſe manners, which diſtinguiſh poliſhed nations, and which lead to political conſequence and eminence amongſt the neighbouring powers. *(a)*

* P. iii.

The origin of inſurance, like that of many other cuſtoms, which depend rather upon traditional than written evidence, and for the honour of inventing and introducing which rival nations contend, has occaſioned much doubt among the writers upon mercantile law. Indeed it is involved in ſo much obſcurity that, after all the reſearches which have been made on the preſent occaſion, any very ſatisfactory ſolution of this doubt cannot be promiſed. One truth however is clear that, wherever foreign commerce was introduced, inſurance muſt have ſoon followed as a neceſſary attendant, it being impoſſible to carry on any very extenſive trade without it, eſpecially in time of war. Some of theſe writers have aſcribed the origin of this contract to *Claudius Cæſar* the fifth *Roman* emperor, on account of a paſſage to be found in *Suetonius*. Other reſpectable authorities have given the honour of it to the *Rhodians*, thus laying a foundation for the idea entertained by many, that the law of inſurance had obtained a place in moſt of the ancient codes of juriſprudence. As the conſideration of this * queſtion will be attended with pleaſure, it will tend much to the complete inveſtigation of it, to conſider the ſtate of commerce amongſt the moſt diſtinguiſhed of the ancient nations, from whence it will appear, that inſurances were in thoſe days wholly unknown: or if they were known, that the ſmalleſt proofs of the exiſtence of ſuch a cuſtom have not come down to the preſent times.

Molloy. Malyne.

2 Atkyns, 554.

* P. iv.

(*a*) Vide Robertſon's View of the Progreſs of Society in Europe.

The

The *Rhodians* claim the firſt place in this enquiry: for although there is undoubted teſtimony, that nations of much greater antiquity than the people of *Rhodes*, (*a*) cultivated commerce, and carried it on to a conſiderable extent, yet there does not appear to be the ſmalleſt ground for entertaining an opinion that any of theſe naval powers had eſtabliſhed amongſt themſelves, much leſs communicated to mankind in general, any code or ſyſtem of marine law. *Rhodes* obtained the ſovereignty of the ſea, about 916 years before the *Chriſtian Æra*, which was almoſt two hundred years before the building of *Rome*. The ſituation and fertility of this iſland were peculiarly favourable for the purpoſes of navigation, for it lies in the *Mediterranean* ſea, a few leagues from the continent of *Leſſer Aſia*; and its wealth and fertility have always been celebrated by the poets and hiſtorians of antiquity. From theſe circumſtances, joined to the activity and induſtry of the people, it long maintained that ſuperiority which it had acquired; its inhabitants were rich, its alliance was courted, though from principles of policy, it generally obſerved a ſtrict* neutrality. Notwithſtanding this pacific diſpoſition, which commerce naturally inſpires, the *Rhodians* at laſt became an object of jealouſy, and were moſt furiouſly attacked and beſieged by various foreign powers. But in all their wars they diſcovered their great ſtrength and ſuperiority at ſea, and conducted their enterpriſes with ſo much activity and ſkill, as to attract the admiration of their enemies, and the applauſe of thoſe hiſtorians who have given an account of the wars in which they were engaged. In the *Punick* wars, the *Romans* found the benefit of their alliance, by the very eſſential ſervice which they performed, in attacking the naval armaments of the *Carthaginians*.

Wealth naturally produces luxury, which gradually enervates the powers of a ſtate. This was the caſe with the *Rhodians*; for after maintaining their political importance from the time already mentioned till the termination almoſt of the *Roman* republic, they viſibly began to decline in wealth and power. *Cicero*, in his ſpeech on the *Manilian* law, obſerves that they were a people, whoſe naval power and diſcipline remained even to the time of his memory; and *Cicero* expired with the republic.

From this ſhort hiſtory it appears, that the *Rhodians* were very famous for their naval power and ſtrength: but however reſpectable they might be on that account, they were much more

Schomberg's Obſerve. on Rhodian laws.

See Anderſon's hiſt. of Commerce.

* P. v.

Polybius. Lib. 16. Schomb. Obſerve.

Cicero pro lege Manilia, cap. 13.

(*a*) Euſebius in his account of mariime ſtates, mentions three anterior to the Rhodians, namely; the Cretans, the Lydians and the Thracians; the firſt of whom flouriſhed about five hundred years before the Rhodians, the next two hundred, and the laſt about eighty years. Euſeb. Chronicon. Lib. 2.

illuſtrious, and obtained a much higher praiſe among the nations of antiquity, for being the firſt legiſlators of the ſea, and for promulgating a ſyſtem of marine juriſprudence, to which even the *Romans* themſelves paid the greateſt deference and reſpect, and which they adopted as the guide of their conduct in naval affairs. Theſe excellent laws not only ſerved as a rule of conduct to the * ancient maritime ſtates; but as will appear from an attentive compariſon of them, have been the baſis of all modern regulations reſpecting navigation and commerce. The time at which theſe laws were compiled is not preciſely aſcertained: but we may reaſonably ſuppoſe, it was about the period when the *Rhodians* firſt obtained the ſovereignty of the ſea, which was about 916 years before the æra of Chriſtianity. *Selden* ſays that the *Rhodians* maintained the ſovereignty of the ſeas 23 years; and that their laws were compiled in the days of *Jehoſaphat*, king of *Judah*. This opinion agrees exactly with the preceding calculation; for this king began his reign about 914 years before the birth of *Chriſt*. Notwithſtanding this, it will always remain a doubtful point, when they were compiled; nor perhaps is it very material that it ſhould be accurately aſcertained. It is of more conſequence to know when they were adopted by the *Romans*; but that is alſo a fact involved in ſome obſcurity. We meet with no traces of them in the time of the republic; and from the manner in which *Cicero* mentions them in the ſpeech laſt alluded to, he treats of them as laws, which had gained the admiration of the world, rather than of ſuch as then made a part of the *Roman* code. *Selden* ſays, that they obtained a place in the *Roman* law in the reign of *Tiberius Claudius*, a conjecture in which he is ſupported by *Peckius*, one of the commentators on the laws of *Rhodes*, and by the well known character of *Tiberius* himſelf, who diſcovered the greateſt attention to maritime affairs, and gave many ſignal inſtances of his attachment to *Rhodes*. But although theſe iſlanders were thus famous for their laws, we cannot diſcover from the fragments that have come down to our times, that they had the ſmalleſt idea of the contract of inſurance; nor is there any tradition to induce us to conjecture, that they ever were * acquainted with that mode of ſecuring their property. It is true, that this is not a concluſive argument; becauſe, although no ſuch contract is mentioned in the fragments which we have, it by no means follows, that it did not form a part of their whole ſyſtem, more eſpecially as *Emerigon*, a very celebrated *French* writer of the preſent day is of opinion, that the real laws of the *Rhodians* have never reached us; and that the fragments which we ſee, are certainly apocryphal. But as theſe laws were adopted by the *Romans*, it is fair to conjecture, that whether we have the real regulations of *Rhodes* or not, we ſhould have the contract of inſurance,

* P. vi.

Selden's Mare clauſum. Lib 1. cap. 10. ſ. 5.

Schomberg Obſ. on Rhodian Laws.

Mare clauſum. lib. 1. cap. 10. ſ. 5.

Sueton. Vita Tiberii Claudii

* P. vii.

Emerigon traite des Aſſurances, preface, p. 3.

if it had been known to them, incorporated with the other naval laws in the Imperial code. This idea is countenanced by the contract of bottomry, which is to be found in the fragments of the laws of *Rhodes*, and with which the people of that island were certainly acquainted; and in every book of the civil law, the contract *de nautico fœnore, de usura maritimâ*, also forms a considerable part. It is not going too far then to presume, that as the *Romans* adopted a contract so beneficial to commerce, as that of bottomry; they would not have passed over a contract, of which the influence is still more extensively useful in the promotion of navigation and trade, if those from whom they borrowed their naval laws, had themselves been acquainted either with its nature or advantages.

Leg. Rhod. f. 1. art. 21 f. 2. art. 16. Digest. lib 22. tit. 2. Cod. lib. 4 tit. 33.

Having said thus much of *Rhodes* and its laws, let us turn our attention shortly to the commerce of the *Greeks*. It is certainly true, that commerce flourished very much in several of the states of *Greece*, particularly in *Corinth* and *Athens*. The former separated two seas, was the key of *Greece*, and a city of the utmost importance: its trade was extensive, having a port to receive the merchandizes of *Asia*, and another, those *of *Italy*; and there have been but few cities where the works of art were carried to so high a degree of perfection. *Athens* indeed was particularly famous for commercial knowledge; for their manufactures of all sorts were in high repute, and emulation was excited by the public rewards and honours which were bestowed upon those, who attained to excellence in any of the useful arts. The attention of this people to maritime affairs, (for they aimed at the sovereignty of the sea and obtained it) contributed much to their skill in navigation. The many laws which they left to posterity, with regard to imports and exports, and the contract of bargain and sale; the many privileges granted to the mercantile part of the state; the appointment of magistrates, who had the cognizance of controversies that happened between merchants and mariners; the attention which they paid to their market, and the many officers concerned in that department, give us a very favourable idea of their judgment in the true principles of commerce. But notwithstanding this, the *Athenians* being of a very ambitious disposition, being more attentive to extend their maritime power than to enjoy it, and having a government of such a cast, that the public revenues were distributed among the common people to be squandered at their pleasure, (*a*) did not carry on so extensive a * trade as might

Montesq. Esprit des loix, liv. 21. ch. 7.

* P. viii.

Taylor's Civil Law. P. 507.

Potter's Grecian Antiq. Vol. 1. p. 80. 83. 84, 167.

* P. ix

(*a*) From several of the orations of Demosthenes it appears, that the poor were entitled to receive from the publick stock, as much money as would admit them to the diversions of the theatre; and besides this it was made a capital offence for any one to propose the restoration of the theatrical money, to its original uses.

This

naturally be expected from the number of their ſeamen, from the produce of their mines, from their influence over the cities of *Greece*, and from thoſe excellent laws and inſtitutions, which have been juſt enumerated. Their trade was almoſt entirely confined to *Greece* and to the *Euxine* ſea. From ſuch of their laws as we have ſeen, and from ſuch accounts as we have obtained of their naval hiſtory, we have not the ſmalleſt reaſon to ſuppoſe, that this celebrated people knew any thing of the contract of inſurance.

Monteſp. Eſprit des loix liv. 21. c 7.

Some notice ſhould have been taken before now of the *Phœnicians*, an ancient commercial and opulent people. Indeed, the height of grandeur to which they attained is a ſufficient proof of the vaſt reſources of a commercial nation. Many writers, both ſacred and profane, from their florid and magnificent deſcriptions, give a vaſt idea of their wealth and power. I forbore to ſpeak of them till I ſhould have occaſion to mention one of their colonies, that of *Carthage*, which in opulence, and the extent of her commerce and naval power, equalled, if not ſurpaſſed the parent ſtate herſelf. Whether either, or both of theſe maritime powers ever promulgated any code of naval law cannot now be aſcertained: for the former was entirely deſtroyed by *Alexander* the *Great*; and that it might never be reſtored he removed its marine and commerce to *Alexandria*, in which removal, probably all its naval regulations might be loſt. *Carthage*, on the other hand, having long diſputed with *Rome* the empire of the world, was at laſt obliged to yield to her victorious rival, who, even after ſhe gained the victory, retained ſuch an hatred to the *Carthaginians*, that ſhe rooted out every veſtige of their former greatneſs. No time, however, nor the hatred of the *Romans*, can wholly obliterate the amazing * accounts which have come down to us, of the enterpriſing ſpirit, and hazardous voyages of the *Carthaginians*, almoſt exceeding the bounds of credibility. Thus much is certain, that they took ſuch diſtant voyages, and went ſo far even without the *Mediterranean*, both to the *South* and *North* of it, as induced many people to ſuppoſe, that they were acquainted with the uſe of the compaſs. It is evident, however, that they only followed the coaſts. Beſides the ancients might ſometimes have performed ſuch voyages, as would make one imagine they had the uſe of the compaſs: for

Beawes Lex Mer. redit. Introd. p. 3

Quint. Curtius, b. 4. cap. 8, &c.

* P. x.

Andreſon's hiſt. of Commerce. Introd. p. 31. 32 fol. edit.

Monteſq. liv. 21 ch. 8.

This cuſtom was at length ſo much abuſed, that under pretence of theatrical money, almoſt all the public funds were diſtributed among the people. Hence the Athenians contracted an averſion for war, and ſpent their time and money upon public ſhews. Of this enormity Demoſthenes vehemently complains, and inveighs againſt, it with as much warmth, as from the nature of the law juſt mentioned, he durſt venture to do. See the firſt and alſo the third Olynthian.

if a pilot were far from land, and during his voyage had ſuch ſerene weather that in the night he could always ſee the polar ſtar, and in the day, the riſing and the ſetting ſun, he might regulate his courſe by them, nearly as we do now by the compaſs. This however muſt be a fortuitous caſe, and not a regular plan of navigation. (*a*)

From a ſlight attention to the commercial and maritime hiſtory of the *Romans*, it will appear that they were as great ſtrangers to the contract of inſurance, as any of thoſe people, of whom much has been already ſaid. It ſeems to be univerſally agreed *that the *Romans* were never very conſpicuous as a maritime power, conſidered either in a commercial or warlike point of view. In the latter caſe they relied chiefly on their land forces, who were diſciplined to ſtand always firm, and undaunted, and till towards the latter age of the republic, when we read of ſome wonderful naval exertions, they do not ſeem to have poſſeſſed any thing of a marine eſtabliſhment. They never were diſtinguiſhed by a jealouſy for trade, and even when they attacked *Carthage*, they did it as a rival for empire, and not for commerce. It is recorded by hiſtorians, that till the firſt *Punick* war, upwards of 400 years after the building of the city, the *Romans* were ſo entirely ignorant of ſhip building, that they took for a model a *Carthaginian* galley, which had been accidentally ſtranded at *Meſſina*. *Carthage*, it muſt be obſerved, was at that time in here zenith of power and greatneſs; and yet from the model of one of her gallies, the *Romans* were able in ſixty days from the time the timber was cut down, to fit out and man for ſea, one hundred gallies. of five tiers, and twenty of three tiers of oars. Such were the ſhips of the famous *Carthage*. The ſpirit of the people of *Rome* was entirely averſe from commerce; and fully juſtifies what was ſaid by a celebrated *Roman* hiſtorian, "*ſeſe quiſque*

* P. xi.

Monteſq. liv. 21. ch 9.

Ferguſon's Rom. Rep. Vol. 1. p. 100.

Salluſt. Catalina. cap. 7.

(*a*) What I have ſaid in the text has been ſuppoſed by ſome not to do ſufficient juſtice to the commercial and enterpriſing ſpirit of the Phenicians, who are ſaid to have viſited Britain about 900 years before Chriſt.† I have already admitted the almoſt incredible voyages which they performed; but as it is alſo undoubtedly true, that they were unacquainted with the mariner's compaſs, the honour of diſcovering which was reſerved for later times, they muſt, in moſt caſes have followed the coaſts. Nor does their viſiting Britain militate againſt this idea; for by attending to the ſituation of the two places, the voyage might have been performed, though no doubt very tediouſly, without once loſing ſight of land.

† See Borlaſe's Hiſt. of Cornwall, p. 27, and Henry's Hiſt. Great Britain, book 1. Chap. 6.

"*hoſtem*

" *hoſtem ferire, murum adſcendere, conſpici, dum tale*
" *facinus faceret, properabat*; *eas divitias, eam bonam famam,*
" *magnamque nobilitatem putabant.*" Theſe exploits were the only glory of a *Roman*, no employment was deemed honourable but the plough and the ſword, and every ſpecies of gain was deemed diſgraceful to thoſe of Patrician rank. But it was from the conſtitution of the government, that individuals were poſſeſſed of this warlike ſpirit, ſo contrary to that which leads to eminence in commercial purſuits. The caſt of their civil government was of a military nature;* and for a conſiderable time, the civil and military officer was the ſame perſon; he diſtributed juſtice in *Rome*, and commanded their legions in the field, till the vaſt increaſe of their empire, and the multiplicity of civil buſineſs occaſioned a ſeparation. The natural conſequence of this was, that no man who was not of the profeſſion of his country, was much eſteemed at *Rome*; and accordingly we find that traders and mechanics were incapable of ſucceeding to any public honours. Nay, ſo far was commerce from being encouraged at *Rome*, that it was deemed prejudicial to the ſtate. The *Romans*, by humanity, terror, triumphs, tributes, and taxes, which they impoſed on the conquered countries, increaſed the riches of their city. Laws were paſſed to prevent the exportation of their gold; the reaſon of which ſeems to be, that it carried away their money and brought them nothing in return but luxury, the bane of virtue, and deſtruction of empire. Could it be expected, ſays Doctor *Taylor*, that a people of ſoldiers, whoſe trade was their ſword, and whoſe ſword ſupplied all the advantages of trade; who brought the treaſures of the world into their Exchequer, without exporting any thing but their own perſonal bravery; who raiſed the publick revenues, not by the culture of *Italy*, but by the tributes of provinces; who had *Rome* for their manſion, and the world for their farm; ſhould have leiſure to ſet forward the articles of commerce, or be likely to pay any regard to the character of its profeſſors? The terms of defiance, upon which they lived with all mankind, in conſequence of this martial ſpirit, would have prevented all the good effects of commerce, had their diſpoſition allowed them to purſue it. That reſtleſs ſpirit, which kept their armies on foot, and their ſwords in their hands, for a ſucceſſion of centuries, was fatal to factories and correſpondence. *The world was in arms, and inſurances and underwriting were but a dead letter. This is very nearly a true repreſentation of the caſe, for it is certain that not one law was made in favour of commerce, in the time of the commonwealth: on the contrary, it was greatly diſcouraged as introductory of luxury, which was ſuppoſed not to be compatible with the ſeverity of their manners. It is alſo no leſs true than ſingular that a people who were ſo well acquainted with the

Livy. lib. 21. cap. 63.

Taylor's Civil Law p. 502.

* P. xii.

Taylor 498.

Civil Law, 501.

*P. xiii

true

true principles of natural reaſon and juſtice, who applied thoſe principles with ſo much propriety to the various wants and neceſſities of human ſociety, and who had the honour of eſtabliſhing a ſyſtem of law, which has been adopted as the rule of action by the greateſt part of *Europe*, and which continues to be ſo even at the preſent day, never attempted to introduce any plan of marine juriſprudence. Nay, this idea is carried farther by ſome writers, who declare, and I believe with truth, at leaſt we can diſcover nothing to the contrary, that the *Romans* did not even take the pains to digeſt the materials which they had borrowed; and that whilſt they carried every other branch of law to the higheſt pitch of accuracy and refinement, they were content to ſtand indebted to one of their own provinces both for the form and matter of their maritime code. Schomberg's obſervations on the Rhodian laws.

The *Romans* it is true, after the firſt *Punick* war, conſtantly maintained a fleet; but long after that time, even in the year of the city 563, it was obſerved of them, that they were very unſkilful in the art of navigation. One of their own hiſtorians, who flouriſhed at the time of the ſecond *Punick* war, and who was tutor to the great *Scipio*, juſtly remarks, that at no period did they ever make any figure at ſea as a commercial power. Even when they arrived at their * higheſt perfection in naval ſkill, their fleets were never employed for the purpoſes of trade, in the diſcovery of new ſtates, or eſtabliſhing commercial intercourſe with thoſe they already knew. The greateſt extent of their commerce was to bring to the market of *Rome* that corn, which they collected in the various granaries of *Sicily*, *Africa*, and *Egypt*. Upon all other occaſions the buſineſs of their fleet was to overawe the conquered, and to tranſport to *Rome* the ſpoils of ruined provinces. In ſuch a ſtate of commerce, it is impoſſible that inſurances could exiſt; and we have already quoted the opinion of a reſpectable author to ſhew that they were unknown. Polybius. * P. xiv. Dr. Taylor ut ſupra.

There are ſeveral reaſons applicable to all the ancient maritime powers, which ſeem to prove to demonſtration, that inſurances were not in uſe. We have ſeen, that inſurances are only introduced where commerce is widely extended. The commerce of the ancients compared with modern times, could not be very conſiderable, as it was chiefly confined within the *Mediterranean*, *Egean*, and *Euxine* ſeas: to which they were compelled more from neceſſity than inclination. *Carthage* in all her glory had not arrived at any great degree of perfection in the art of ſhip building. Veſſels of the beſt conſtruction at that time could only be navigated with oars, or when they had a fair wind on a ſmooth ſea: they might be built of green timber; and in caſe of a ſtorm, could run aſhore under any cover, or upon any beach that was free from rocks: in ſhort, they were merely galliès, and were managed with the greater difficulty on account Anderſon's hiſt. of Commerce. Monteſq. Eſprit des loix liv. 21. ch. vi.

of

of the poſition of the ſails, and the mode of rigging practiſed in thoſe days. This could not fail of proving a conſiderable obſtacle to the extenſion of commerce. But when we conſider, in addition to the bad conſtruction of their ſhips, that * the antients were utterly ignorant of that unerring guide, the mariner's compaſs (the honour of inventing which was reſerved for more modern times) by reaſon of which they durſt not venture out of ſight of land, for fear of being overtaken by tempeſts, and being left at large in the boundleſs ocean, their commerce could not have been great; although we are even led to admire the progreſs which they made in commercial affairs. It is true, that many diſtant naval expeditions were made under all theſe diſadvantages, which often proved fatal to the adventurers. (*a*) Theſe expeditions, however, could add little or nothing to their maritime or geographical ſkill, in which the ancients were certainly very deficient, on account of the neceſſity they were always under of coaſting the ſhores, for want of a better guide; and indeed, the ſhores were the only compaſs. Theſe obſervations are not intended to detract from that merit, which has been already allowed to the ancients for their naval exertions; becauſe they are founded merely on a compariſon of their powers and knowledge in thoſe arts with the improvements of the moderns, and are adduced to ſhew that, under ſuch diſadvantages and obſtacles to the extenſion of their trade and commerce, it was impoſſible that inſurances could be at all known to the ancient world. (*b*)

* P. xv.

Monteſq. vol. 2. ch 6.

M. *Emerigon* agrees, that the contract of inſurance, as it is underſtood at this day, was not in uſe amongſt the *Romans*; but he thinks he diſcovers ſome traces of * it in the hiſtory of that people. The firſt inſtance given by this learned writer is this, that about the time of the ſecond *Punick* war, thoſe who had undertaken to ſupply the troops in *Spain* with proviſions and military ſtores, made it a previous condition that the republic ſhould be at the hazard of exporting them, according to the words of *Livy*, "*Ut* "*quæ in naves imposuissent, ab hostium, tempestatisve vi, publico* "*periculo esset*" But with all deference to ſo great a name, this ſeems to bear no reſemblance to the contract of inſurance; for it is nothing more than every well regulated ſtate is bound to do by the ties of natural juſtice. It is equitable and right, that thoſe, who in times of public danger, appropriate their private wealth to the advancement of the public ſervice, ſhould be

Preface to his work, p. 4.

* P. xvi

Livy, lib. 23. cap. 49.

(*a*) Huet, Biſhop of Avranches, in his very inſtructive and entertaining treatiſe on the commerce and navagation of the ancients has with infinite labour and accuracy collected the moſt remarkable facts on this head. Ch. 8.

(*b*) See note (*a*) page 10.

reimburſed

reimburſed from the purſe of the ſtate for the private loſſes they may ſuſtain. This indeed is the rule of conduct between man and man; for when one man purchaſes goods of another to be ſent abroad, was it ever ſuppoſed that the ſeller was to run the riſk of the voyage; or that if the goods periſhed he was never to be paid? If ſuch a doctrine were to prevail in any country, the ſtate could only be ſupplied with neceſſaries in time of war, by means of extortion, rapine, and violence.

Another inſtance given by *Emerigon* is a ſtory, which we find recorded by *Livy*, of ſome men, who were charged with the care of exporting proviſions for the army, and who, *quia publicum periculum erat a vi tempeſtatis in iis, quæ portarentur ad exercitus*, endeavoured by fraud to deſtroy the ſhip, and then told the directors of the ſtate, that many very valuable articles were on board; whereas they had taken care to ſend out very old, rotten ſhips, in which were a few commodities, and thoſe * of ſmall value. That part of this ſtory which is material to the preſent enquiry, has already met with an anſwer in what was ſaid upon the laſt quotation, and the propriety of a government's indemniſying thoſe, who might ſuffer in the public ſervice, is not at all altered by the miſconduct of ſome individuals (*a*)

Traite des Aſſur. loc. cit. Livy, lib. 25. cap. 3.

* P. xvii

The next inſtance is from one of *Cicero's* epiſtles, and is of a different nature from thoſe laſt mentioned; becauſe here *Cicero* ſeems to wiſh that the property in queſtion ſhould be ſecured, not only for himſelf, but alſo for the people of *Rome*. *Cicero*, having gained a victory in *Cilicia*, and the civil war between *Cæſar* and *Pompey* being then a matter almoſt unavoidable, wrote to *Caninius Salluſtius* at *Laodicea*, in which letter he uſes theſe words; "*Laodiceæ me prædes accepturum arbitror omnis pecuniæ pub-*" *licæ, ut et mihi et populo cautum ſit ſine vecturæ periculo.*" From this paſſage it is inferred that *Cicero* alludes to an inſurance. I own from the meaning of the word *prædes*, and from the ſituation of affairs at *Rome*, it ſeems as if *Cicero* wiſhed rather to find ſome ſecure and ſubſtantial perſon at *Laodicea*, in whoſe care and cuſtody he might leave this money till more peaceable times: and it is very unlikely that in ſuch a troubleſome conjuncture he ſhould be deſirous of bringing a great treaſure to the ſcene of faction and confuſion, eſpecially as in a letter to his friend *Atticus*, he declares himſelf at a great loſs to know what line of conduct he ought to purſue. But even if he wiſhed

Epiſtoæ ad Familiares lib. 2, epiſt. 17.

Ferguſon's hiſt of the Rom. Rep book 4. ch. 5.

*P. xviii Cicero ad Atticum, lib. 7. epiſt 1.

(*a*) It has been truly obſerved by Mr. Millar (for an account of whoſe work upon inſurances ſee the preface to this ſecond edition) that in theſe inſtances from the Roman hiſtorians, no mention is made of a premium paid by the merchant for the hazard undertaken; and that they are rather to be conſidered as examples of a bounty offered by the publick, than of a mutual contract.

to bring it to *Rome*, the mode he propoſed ſeems more like the modern bill of exchange, than a policy of inſurance. (*a*) Beſides unleſs this ſpecies of contract was at that time tolerably well underſtood, *Salluſt*, the perſon to whom he wrote, would have found conſiderable difficulty in comprehending his meaning from the ſingle ſentence in his letter, which has been mentioned; and if it were well known, is it poſſible to ſuppoſe it would not have obtained a place in their code of laws?

Molloy
Malyn

But the paſſage upon which thoſe, who contend for the antiquity of this branch of commerce, have chiefly relied, is one to be found in *Suetonius*, in the eighteenth chapter of his life of *Tiberius Claudius*, the fifth emperor of *Rome*. "*Negotiatoribus* "*certa lucra propoſuit, ſuſcepto in ſe damno, ſi cui quid per* "*tempeſtates accidiſſet.*" This ſentence wholly unconnected ſeems to convey ſuch an idea; but we muſt attend to the context, in order to underſtand it. This relates merely to the corn trade; for as the *Roman* territory was not ſufficient to ſupply enough for the conſumption of the city, it became abſolutely neceſſary to give great encouragement to this branch of commerce: nay it was a political, not a mercantile concern; for the very exiſtence of the empire depended upon it. It was this * circumſtance, which induced the emperor to pay ſuch regard to this branch of trade, to propoſe bounties, and to confer certain privileges, the *certa lucra*, of which *Suetonius* ſpeaks, upon thoſe who would venture out to ſea for the public ſervice in the midſt of winter.

* P. xix

Civil Law, p 499.

Dr. *Taylor* tells us, that a private conſideration alſo had ſome weight with *Claudius* upon this occaſion, for that once in a great ſcarcity of proviſions, he was attacked in the forum by the populace, and ſo diſagreeably treated with abuſe, and cruſts of ſtale bread, that he with great difficulty eſcaped through ſome private paſſage; from which time he made it his great care and concern to get corn imported, even in the winter. As to the riſk, which *Suetonius* ſays the emperor took upon himſelf, it is to be obſerved, that although the ſhips were private property, yet they would not have gone to ſea in the dangerous ſeaſons they did, had it not been for the public ſervice, and to provide proviſions for the uſe of the whole city. This being the caſe, we have already ſhewn, that it would be contrary to the firſt

(*a*) Since I publiſhed the firſt edition of this work I have looked into Melmoth's tranſlation of Cicero's epiſtles; and I am happy to find that without knowing I had ſuch an authority, I have put the ſame ſenſe upon this paſſage which that elegant tranſlator had done before me. The whole ſentence is tranſlated thus: "I purpoſe to leave the money at Loadicea, which ſhall "ariſe from the ſale of thoſe ſpoils, and *to take ſecurity* for its "being paid in Rome, in order to avoid the hazard both to "myſelf and the commonwealth of conveying it in ſpecie."

principles

principles of juſtice and equity, and to the practice followed at this day by all governments which are founded on juſt principles, to allow ſuch loſſes to fall upon individuals (*a*). From what has been ſaid it appears evident, that the *Romans* had no knowledge of inſurances; in addition to which both *Grotius* and *Bynkerſhoek* have expreſsly declared, that among the ancients this contract was unknown; the latter of whom uſes theſe expreſſions: "*Adeo tamen ille contractus* *olim *fuit incognitus*, "*ut nec nomen ejus, nec rem ipſam in jure Romano deprehen-*"*das.*" (*b*)

Grotius de Jure Belli, lib. 2. cap. 12. ſ. 3. Bynk. queſt. Juris Publici. lib. 1. cap. 21.

* P. xx.

But to whatever degree of excellence the *Romans* attained either in literature, commerce, or any of the refined arts, they all viſibly declined when the *Roman* empire was over-run by the barbarians; or, perhaps it may be ſaid with greater propriety, that they were overwhelmed and loſt with that power, which had raiſed them to be the object of public attention and notice. For in times of public ruin and deſolation, when war rears its ſtandard, lays waſte cities, and tramples on the nobleſt improvements, it is impoſſible for commerce to hold its ſtation, or to flouriſh in the midſt of contention and tumult.

(*a*) The obſervations here made ſeem, upon examination, to be agreeable to the ideas of Dr. *Taylor*, the preſident *Monteſquieu*, and Mr. *Schomberg*, upon the ſame ſubject. See alſo the opinion of a learned civilian, *Langenbeck*, of *Hamburgh*, in *Magen's* Eſſay on Inſurances. Vol. 1. p. 1.

(*b*) By a late work of *M. De Pauw*, entitled *Recherches Philiſophiques ſur les Grecs*, it is manifeſt that the *Athenians* were well acquainted with the nature of bills of exchange; and this learned foreigner ſeems to think it a matter of uncertainty whether the inſurance of ſhips was ever practiſed among them: but he ſays it is clear that barratry was not unknown to them. I am inclined, however, to think with *Grotius* and *Bynkerſhoek*, that this contract was as much unknown to that great people, as to the reſt of the ancient world. If this had not been the caſe, can it be ſuppoſed that we ſhould find no trace of it in their hiſtory, the ſpeeches of their orators, or their laws? Is it not as likely to have been mentioned as bills of exchange: and particularly when barratry was mentioned, if this contract had had an exiſtence, would it not have been ſtated, on whom the loſs was to fall? Beſides, the inſtance given of barratry by *M. De Pauw* is not what we call barratry in *England*; for the caſe put is a caſe of fraud committed by the owners, who, by the law of *England* cannot commit barratry, *which is a criminal act of the captain, to the prejudice of his owners, and without their privity or conſent.*

* P. xxi. Hume's Hiſt. of England.

*It is the obſervation of a profound modern hiſtorian, that there is an ultimate point of depreſſion, as well as of exaltation, from which human affairs naturally return in a contrary progreſs, and beyond which they ſeldom paſs in their advancement or decline. This was the caſe with reſpect to commerce. When the repeated incurſions of the Barbarians had ravaged the *Roman* empire, and had checked every liberal improvement, ſome people, forced by neceſſity, or led by inclination, took ſhelter in a few marſhy iſlands that lay near the coaſt of *Italy*, and which would never have been thought worth inhabiting in time of peace. This happened in the ſixth century, and at the firſt ſettling of theſe wanderers, they had certainly no other object in view, than that of living in a tolerable degree of ſecurity from their enemies, and of procuring a moderate ſubſiſtence. As theſe iſlands were divided from each other by narrow channels, and thoſe channels were ſo incumbered by ſhallows, that it was impoſſible for ſtrangers to navigate them, they found that ſecurity which they wiſhed; and by uniting among themſelves for the ſake of improving their condition, they became in the eighth century a well eſtabliſhed republic. This though it may appear ſtrange, was the origin of the famous republic of *Venice*, which ſoon became a great commercial power; for, from the firſt moment that thoſe people took poſſeſſion of the iſlands, neceſſity made them extremely attentive to commerce; the firſt beginning of which was naturally fiſhing. Next to fiſhing, they began to trade in ſalt, many pits of which were diſcovered in their own iſlands; and at laſt their city gradually became the magazine for the merchandize of the neighbouring continent on all ſides, and they themſelves * the general carriers of *Europe*. Thus to the people of *Italy*, and to thoſe of *Venice* and *Genoa* in particular, we are to attribute the re-eſtabliſhment of commerce. Of the cauſes which contributed to its revival, it remains to ſpeak.

Anderſon's Hiſtory of Commerce, fol. vol. 1. p. 19. 20.

* P. xxii

Various cauſes concurred to revive the ſpirit of commerce, and to renew, in ſome degree, that intercourſe between nations, which, during the period of *Gothic* ignorance and barbarity, had been much interrupted. The religious wars of the eleventh century, called the Cruſades, by leading many from every part of *Europe* into *Aſia*, opened an extenſive communication between the Eaſt and Weſt; and though the avowed purpoſe of theſe expeditions was conqueſt, and not commerce; though the iſſue of them proved as unfortunate, as the motives of undertaking them were wild and enthuſiaſtick, yet their commercial effects were beneficial and laſting. For the firſt armies, which ranged themſelves under the banner of the Croſs, having been led through a vaſt extent of country, and having ſuffered ſo much from the length of their march, and the barbariſm and inhoſpitality of the people inhabiting thoſe countries through which they travelled, others were deterred from taking the ſame courſe;

courſe; and choſe rather to go by ſea, than encounter ſo many hardſhips. *Venice*, *Genoa*, and *Piſa*, furniſhed the tranſports, to convey the troops: and it is reported, that the ſums were immenſe which they received merely for freight. Beſides this, the Cruſaders contracted with them for ſupplies of military ſtores and proviſions; their fleets hovered on the coaſt; and by ſupplying the army with whatever was wanting, they engroſſed all the advantages ariſing from this branch of commerce. Theſe ſtates were alſo benefited by the ſucceſs, which attended the arms of theſe religious and enthuſiaſtick * heroes, for there are charters yet extant, containing grants to the *Venetians*, *Piſans*, and *Genoeſe*, of great privileges in the various ſettlements, which the Chriſtians had gained in *Aſia*. When the Cruſaders ſeized *Conſtantinople*, the *Venetians*, who had planned the enterprize, transferred to their own State many of the valuable branches of commerce, which had formerly centered in *Conſtantinople*. Another great cauſe of the revival of commerce, was the invention of the Mariner's Compaſs, which, by rendering navigation more ſecure as well as more adventurous, facilitated the communications between remote nations, and brought them nearer to each other. The honour of this invention, ſo beneficial to mankind, has been claimed by the *French*; and their claim has been allowed by ſeveral authors, and maintained by a celebrated writer of their own. In this opinion perhaps national partiality may have ſome weight. Moſt authors, however, agree that the inventor was *Flavio de Gioia*, a native of *Amalfi*, an ancient commercial city in the kingdom of *Naples*. (*a*)

It is evident, that almoſt all the commerce of *Europe*, in thoſe days, centered amongſt the *Italians*. As they at that time carried on and eſtabliſhed a regular trade with the Eaſt in the ports of *Egypt*, and drew from thence all the rich produce of *India*; it is reaſonable to ſuppoſe, that in order to ſupport ſo * extenſive a commerce, theſe induſtrious and ingenious people were the firſt, who introduced inſurances into the ſyſtem of mercantile affairs. It is true, there is no direct authority to warrant a poſitive aſſertion, that they were the inventors of this kind of contract: but it is certain, that the knowledge of it came with them into the different maritime ſtates, in which parties of them ſettled; and when it is admitted that they were the carriers, manufacturers,

Robertſon's View of Society, &c.

* P. xxiii

Huet Traite du Commerce des Anciens, cap. 10. Anderſ. Hiſtory of Commerce fol. edit. vol. I. p. 144

* P. xxiv

(*a*) It appears from *Anderſon*, that ſome people had ſuppoſed that the conqueſt of *Charlemagne* in *Italy*, towards the end of the 8th century, and his ſubſequent eſtabliſhment of Chriſtianity in the Weſtern and Northern parts of *Germany*, contributed greatly to the revival of commerce. In what I have ſaid upon this ſubject, I choſe rather to follow the ſteps of a very elegant and profound hiſtorian of modern times. *Robertſon's* View of Society, &c.

Anderſon's introd. fol. edit. p. 7.

and bankers of *Europe*, it is probable that they alſo led the way to the eſtabliſhment of a contract, which is ſo eſſentially neceſſary to the ſupport and cultivation of commerce. It has, however, been aſſerted by writers of the *French* nation, (*a*) that inſurance dates its origin in the year 1182, and that it was introduced by the *Jews*, who were baniſhed from *France* about that period, and who took that method to facilitate and ſecure the removal of their effects. They proceed to ſay, that the *Lombards*, who were not idle ſpectators of this contrivance adopted it, and in a ſhort time improved it conſiderably. It is not very neceſſary to enquire into the truth of this fact, nor indeed are there materials to enable us to do ſo: but it is obſervable that the Preſident *Monteſquieu* mentions that the *Jews* upon this occaſion invented bills of exchange; but does not ſay a ſyllable of policies of inſurance. It is agreed, however, that if the *Lombards* were not the inventors, they were at leaſt the firſt who brought the contract of inſurance to perfection, and introduced it to the world. (*b*)

Monſ. Savary Dict. Univ. Le Guidon, c. 1. art 1.

Eſprit des Loix liv' 21. c. 16.

*P. xxv Before we come to conſider the amazing improvements which have taken place, with reſpect to this branch of commerce, in our own country, in theſe days, it will be expected that ſome notice ſhould be taken of thoſe maritime codes, and naval regulations, which have diſtinguiſhed the modern, no leſs than the laws of *Rhodes* did the ancient world.

To the people of *Amalfi*, we are indebted as well for the firſt code of modern ſea laws, as for the invention of the compaſs. We learn from *Anderſon*, that the city of *Amalfi*, ſo long ago as the year 1020, was ſo famous for its merchants and ſhips, that its inhabitants at that time obtained from the Caliph of *Egypt*, a ſafe conduct, to enable them to trade freely in all his dominions: and they alſo received from him ſeveral other diſtinguiſhed privileges. It was towards the cloſe of that century, that they promulgated their ſyſtem of marine law, which from the place of its compilation, received the denomination of *Tabula Amalfitana*. This table ſuperſeded in a great meaſure the ancient *Jus Rhodianum*; and its authority was acknowledged by all the States of *Italy*, for ſome centuries. But as trade increaſed very rapidly in other cities on the coaſt of the *Mediterranean* ſea, they became

Vol. 1. p. 58.

(*a*) *Anderſon* ſays, the *Jews* were baniſhed from *France*, in 1143. *Anderſon's* Hiſtory of Commerce, vol. 1. p. 82. But I believe ſuch an event twice took place in that kingdom.

(*b*) I am aware that ſeveral learned men are of opinion, that inſurances were of an earlier date than is here aſcribed to them, On a ſubject where ſo much obſcurity muſt neceſſarily exiſt, I am by no means tenacious of my opinion; but the inclination of my mind is to adhere to the idea that the *Lombards* were the inventors. See alſo Mr. *Millar's* Introduction.

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unwilling to receive laws from a neighbouring ſtate, which they now equalled, if not ſurpaſſed, in the extent of their naval eſtabliſhments. Every one therefore, began to erect a tribunal, in order to decide all controverted points, according to laws peculiar to itſelf; but ſtill referring in matters of higher moment, to the former rule of action, the *Amalfitan* code. From ſuch a variety of laws, as muſt neceſſarily be the conſequence of each of the *Italian* ſtates becoming its own legiſlator, ſo much diſorder and confuſion aroſe, that general convenience at laſt compelled them to do that, which jealouſy * of each others power and growing commerce would for ever have prevented them from effecting; and at a general aſſembly, it was agreed to digeſt the laws of all the ſeparate communities into one body. Every regulation therefore, which was thought to be founded in juſtice either in the laws of *Marſeilles*, *Piſa*, *Genoa*, *Venice*, *or Barcelona*, was collected into one maſs, and publiſhed in the 14th century, under the title of *Conſolato del Mare*. A *French* writer *Sur la Saiſie des Batimens neutres* ſpeaks of this production in a very unfavourable way; and calls it a rude, ill formed maſs of maritime and poſitive regulations, of ordinances of the middle ages, and of private deciſions. Indeed when we conſider that this was a compilation from the various regulations of ſo many different ſtates, it could not excite much ſurpriſe, if it really merited the cenſure of this author. But upon examination, it is a work of conſiderable merit; the deciſions it contains are founded on the laws of nations; it has been received and allowed to have the force of law in every part of *Italy*; and it is the ſource from whence the people of that country, as well as thoſe of *Spain* and *France*, have been ſaid to derive many of their beſt marine regulations. Unfortunately too, *Emerigon* has diſcovered, that becauſe one of the chapters in the *Conſolato del Mare* overturns ſome favourite ſyſtem of this learned author, he is out of humour with the whole compoſition. One thing, however, is clear, that neither the *Conſolato del Mare*, nor the *Amalfitan* code, upon which it is founded, contains any thing upon inſurance law, ſo that we have here another confirmation of the idea, that this contract was not a production of very ancient times (*a*).

P.

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Vinnius in Peckium, 190.

Emerigon, preface, p. 3.

* The ſpirit of commerce was not, however, confined to the South parts of *Europe*; it now began to extend itſelf among the inhabitants of the Weſtern coaſts. But whatever maritime regulations they might have eſtabliſhed among themſelves, they were found not to be ſufficiently extenſive for the commercial intercourſe, which began to take place in thoſe countries in the

* P. xxvii

(*a*) In what I have ſaid upon the *Amalfitan* code, I have found myſelf extremely indebted to Mr. *Schomberg's* very ingenious obſervations upon that ſubject, in his treatiſe on the maritime laws of *Rhodes*.

courſe of the 12th century. Accordingly about the year 1194, *Richard* the Firſt, king of *England*, on his return from his wild expedition to the *Holy Land*, having ſtaid to repoſe himſelf for ſome time at the iſle of *Oleron*, in the *Bay* of *Biſcay*, an iſland which he inherited in right of his mother, whoſe portion it was in marriage with his father *Henry* the Second, gave orders for the compilation of a maritime code. Some authors ſuppoſe that the hardſhips and dangers, to which in the courſe of his expedition, he ſaw adventurers by ſea were expoſed, induced him to promulgate a law, by which their condition might be rendered more comfortable. Others imagine, and probably their ſuppoſition is better founded, that the great intercourſe between his *Engliſh* and *French* ſubjects, and their allies, required a certain general ſyſtem of ſea law, for the more ſpeedy and impartial determination of all diſputes, which might occaſionally ariſe. The laws of *Oleron*, therefore, which are in ſubſtance but an abſtract of the old *Rhodian* laws, with ſome additions and alterations, accommodated to the practice of that age, and the cuſtoms of the Weſtern nations, were propoſed as a common ſtandard and meaſure for the more equal diſtribution of juſtice amongſt the people of different governments. Theſe excellent regulations were ſo much eſteemed, that they have been the model, on which all modern ſea laws have been founded; and two diſtinguiſhed nations * have contended for the honour of their production. *France*, jealous of the luſtre which the *Engliſh* juſtly derive from the production of this code, with much anxiety claims this honour to herſelf; and very diſtinguiſhed authors have ſtood forth the champions of her claim. The ſubſtance of their argument is, that *Eleanor*, wife of *Henry* 2d king of *England*, and Ducheſs of *Guyenne*, returning from the *Holy Land*, and having ſeen the beneficial effects of the *Conſolato del Mare*, ordered the firſt draught of the judgments or laws of *Oleron* to be made: *that her ſon Richard the Firſt, returning from the ſame expedition, enlarged and improved* what his mother had begun: that they were certainly intended for the uſe of the *French* merely, becauſe they were written in the old *Gaſcon French*, without any mixture of the *Norman* or *Engliſh* languages: that they conſtantly refer for examples of voyages to *Bourdeaux*, *St. Malo*, and other ſea ports in *France*; never to the *Thames*, or to any port of *England*, or *Ireland*: and that they were made by a Ducheſs and Duke of *Guyenne*, for *Guyenne*, and not for their kingdom of *England*. One of theſe learned writers adds a reaſon, which he thinks very concluſive to prove that theſe laws were of *French* extraction, namely, that from their firſt appearance, their deciſions have been treated with extreme reſpect in the courts of *France*.

In theſe days, it is very immaterial whether *France* or *England* is

Schomberg's Obſerv. on the Rhodian Laws.

Sir Philip Meadow's Obſerv. on the Dom. of the Sea, c. 4.

* P. xxviii.

Cleirac Coutumes de la Mer, p. 2. Valin. Emerigon,

Valin.

is entitled to the honour they reſpectively claim, and I ſhall not tire the reader with any argument upon the point (*a*). * P. xxix.

* *Anderſon* in his hiſtoty of commerce has expreſly ſtated, but he does not adduce any authority in ſupport of his opinion, that the laws of *Oleron* treat of inſurances. I have read them repeatedly with the direct view of diſcovering whether inſurances were of ſo ancient a date: but I have not found a ſingle word, which could induce me to ſubſcribe to ſuch an aſſertion. In confirmation of my opinion, *Emerigon*, ſpeaking of theſe laws, has obſerved, "*Il n'y eſt pas* "*dit le mot du contrat d' Aſſurance*, "*qui apparemment n'etoit pas encore alors en uſage.*" Vol. 1. p. 454. Preface, p. 11.

But while we pay due reſpect and veneration to thoſe maritime regulations, which diſtinguiſhed the Southern and Weſtern parts of *Europe*, it would be improper ſilently to paſs over the laws which were ordained by an induſtrious and reſpectable body of people, who inhabited the city of *Wiſbuy* famous for its commerce, and renowned on the ſhores of the *Baltic*. The merchants of this city carried on ſo extenſive a trade, and gave themſelves up ſo entirely to commerce, that they muſt doubtleſs have found a great inconvenience in having no maritime code, to which they could refer to decide their diſputes. To ſuch a cauſe we are probably indebted for thoſe laws and marine ordinances, which bear the name of *Wiſbuy*, which were received by the *Swedes*, at the time they were compoſed, as a juſt and equitable rule of action, and which were long reſpected (and for ought I know, are to this day obſerved) by the *Germans*, *Swedes*, *Danes*, and by all the Northern nations: although the city in which they received their origin, has long dwindled into inſignificancy and contempt. At what time theſe laws were compiled is a matter of diſpute; and different writers have adopted different periods, in order to anſwer their own particular * ends, or to advance the honour of that age which it happened to be their buſineſs to extol. The writers of the North pretend that *Wiſbuy* was a great commercial city, in the 9th century; from whence they argue, that their laws muſt be of very high antiquity; that they were the model, from which thoſe of *Oleron* were copied, and that they were received and acknowledged by all nations in *Europe*, even to the ſtraits of *Gibraltar*. On the other hand it is anſwered, and with much ſtrength of reaſoning, that the Northern code is a tranſcript from that of *Oleron*, although it contains ſeveral additions: for it has been ſhewn, that the laws of *Oleron* were promulgated by *Richard* the Firſt about the cloſe of the twelfth century, at which time, as appears by the report of a *Swediſh* hiſtorian, the city of

Cleirac Uſ et Coutumes de la Mer; Emerigon, Prefe. * P. xxx Cleirac 4. Olaus Magnus, lib. 10. cap. 16.

(*a*) For the arguments in favour of the *Engliſh* claim, the reader may conſult *Selden's Mare Clauſum*, lib. 2. cap. 24. Mr. Juſt. *Blackſtone's* Commentaries, vol. 1. page 418. *Schomberg's* Obſervations, page 88.

Wiſbuy was not built, nor for near a century afterwards; that the inhabitants were merely ſtrangers collected together from different parts, who, ſo far from having any power or influence over their neighbours, were not abſolute maſters of their own city. Beſides, if their laws had been prior to thoſe of *Oleron*, we ſhould have found in the latter ſome regulations reſpecting inſurances; becauſe a copyiſt never would have omitted ſo material a branch of commercial legiſlation, the laws of *Wiſbuy* having expreſsly mentioned inſurances, and provided, that if the merchant obliged the maſter to inſure the ſhip, the merchant ſhall be obliged to inſure the maſter's life againſt the hazards of the ſea.

Art. 66.

Afterwards towards the cloſe of the fifteenth century, we find from hiſtory, that many conſiderable regulations were made at *Barcelona* in *Spain*, reſpecting marine inſurances.

Robertſon's View, vol. 1. p. 351. quarto edit. Emerigon, preſ. p. 12

*But if the laws of *Wiſbuy* were not prior to thoſe of *Oleron*, yet it is much to their honour, and ſhews in what eſtimation they were held in the greateſt part of *Europe*, that after having for a long courſe of time enjoyed the higheſt authority in all the Northern tribunals for maritime affairs, they were thought worthy of being adopted as the baſis of the ordinances of the *Hanſeatick* league. Of this ancient and famous confederacy it will be ſufficient in this place to obſerve, that it began about the thirteenth century, and originated with the cities of *Lubeck* and *Hamburgh*, which were obliged to enter into a league of mutual defence, in order to protect themſelves againſt the nations round the *Baltick*, who were extremely barbarous, and infeſted that ſea with their piracies. Theſe two cities derived ſuch advantages from their union, that other towns acceded to the confederacy, and in a ſhort time, eighty of the moſt conſiderable cities, ſcattered through thoſe countries, which ſtretch from the bottom of the *Baltick* to *Cologne* upon the *Rhine*, joined in the famous *Hanſeatick League*; which became ſo formidable, that its alliance was courted, and its enmity dreaded by the moſt powerful monarchs. This aſſociation, it is ſaid, formed the firſt ſyſtematick plan of commerce known in *Europe*: but notwithſtanding this, they did not for a long time publiſh any maritime code, but were entirely governed by thoſe of *Oleron* and *Wiſbuy*. At a general meeting, however, held at *Lubeck* in the year 1614, it was agreed to extract from thoſe compilations whatever ſhould be thought moſt uſeful, and that it ſhould in future be the rule of deciſion in every conteſted point. It was prior to this time, about the fourteenth century, that the members of this league were in their greateſt ſplendour; their commerce was at its height; they ſupplied the reſt of *Europe* with naval *ſtores, and they pitched upon different towns, the moſt eminent of which was *Bruges* in *Flanders*, where they eſtabliſhed ſtaples, in which their commerce was regularly carried on. The ſovereigns of *Europe* looked up to the *Hanſeatick League* with eſteem and admiration, and the kings of *France*

Schomb. obſerv. 106.

Robertſon's View of Society.

Kuricke Comm. Schomb. Obſerv.

Robertſon's View, &c. Ander. Hiſt. of Comm.

* P. xxxi

* P. xxxii

and

and *England* granted them conſiderable privileges. But when this union had rendered them rich and powerful, they grew arrogant and over-bearing, which induced the princes, whom they had offended, to take a cloſer and more accurate view of the danger which might ariſe from ſuch a confederacy, and of the advantages which might accrue to themſelves from the poſſeſſion of their trade. Theſe cauſes at laſt concurred to effect the decay of this alliance, which however is not wholly diſſolved at this day; as the cities of *Lubeck*, *Hamburgh*, and *Bremen*, maintain ſufficient marks of that ſplendour and dignity with which this confederacy was anciently diſtinguiſhed. Hum's Hiſt. of England, vol 4. p. 348, 349.

Having thus taken a brief but comprehenſive view, of the moſt conſiderable maritime ſtates both of ancient and modern times, I forbear to go more at length into the hiſtory of ſeveral governments, which have publiſhed naval regulations for the direction of their own ſubjects; becauſe they are only binding within their own particular diſtricts; they are very ſimilar to thoſe about which ſo much has been already ſaid; they are all collected by *Magens* in the ſecond volume of his Eſſay on inſurances, and are occaſionally referred to in the courſe of the enſuing work. Beſides, I haſten to give an account of the vaſt improvements, which have been made in this country within theſe laſt thirty years, with reſpect to inſurances, and which are the main object of this enquiry. It would, however, be improper in a work of this nature, entirely to paſs *over the *French* nation, the maritime ſtrength of which has of late years conſiderably encreaſed; and whoſe writers upon commercial affairs would reflect honour upon any country. *P.xxxiii

Few people underſtand the theory of commerce better than our neighbours on the Continent; and yet they have not in practice come up to what might have been expected. It is true that *France* from her ſituation, from the bent of her people to certain manufactures, from the happineſs of her ſoil, and her natural advantages, muſt be always poſſeſſed of a great internal and external trade, which muſt add greatly to her wealth, and render her the moſt reſpectable power on the Continent of *Europe*. But the *French* do not naturally poſſeſs that undaunted perſeverance, which is neceſſary for commerce and colonization. It is beſides a great diſadvantage to the commerce of *France*, that as its government is military, the profeſſion of a merchant is not ſo honourable as in *England*, ſo that the *French* nobility think that it would be beneath them to attend to the drudgery of trade, and that it would degrade their anceſtry to allow any of their ſons to follow the buſineſs of a merchant. The conſequence of this is, that the church, the law, and the army are ſtocked with the members of noble families; and the counting houſe is by them entirely deſerted. At one period, indeed, there was an appearance that *France* would make as illuſtrious a

figure amidſt the powers of *Europe* in trade, as ſhe then did as a warlike nation. The period, to which I allude, was under the adminiſtration of the famous *Colbert*, who next to *Henry* the Great, may juſtly be ſtiled the father of the *French* commerce and manufactures. This illuſtrious man, who was of *Scotch* extraction, deſcended of a family no way conſiderable by its ſplendour or antiquity, raiſed himſelf * by his activity, diligence, and knowledge of commerce, to the firſt offices under the government of *France*. Being appointed to the ſuperintendance of the finances, he propoſed ſuch regulations, as brought about the purpoſe he intended, the orderly and frugal management of them; and eſtabliſhed the trade of *France* with the *Eaſt* and *Weſt Indies*, from which ſhe has reaped conſiderable benefits. He alſo patronized and encouraged the liberal arts and ſciences, reformed the courts of juſtice, and introduced many important regulations, which regarded the order of ſociety. But in 1669, when appointed ſecretary of ſtate, and entruſted with the management of affairs relating to the ſea, he had a full opportunity of exerting thoſe talents, which he ſo eminently poſſeſſed, and for the exertions of which his name has been tranſmitted with ſo much honour to poſterity. In order to gain a proper inſight into the true effects of commerce upon the various nations of the world, and the advantages of ſome particular branches of trade, he procured and employed learned and diligent men to enquire into the commercial hiſtories of cities long ſince deſtroyed, and the nature of the climate, ſoil, and productions, of the countries then riſing into notice. It was to this ſpirit of enquiry in this famous ſtateſman, that the world is indebted, as appears from the dedication, for that very maſterly performance upon the commerce and navigation of the ancients, written by *Huet* biſhop of *Avranches* and *Soiſſons*, who is juſtly entitled to a high rank among men of letters. *Colbert* having thus made uſe of the labours of others in order to gain uſeful information, undertook to reſtore the navy and commerce of *France*; and he completed all his ſervices by the publication of that excellent body of Sea laws, known by the name of the Ordinance of *Lewis* the 14th, which comprehend every * thing relating to naval or commercial juriſprudence; and of which the doctrine of inſurances forms a conſiderable part. To its merits all *Europe* has borne teſtimony; and the name of *Colbert* muſt ever be mentioned with reſpect, when the ordinances of *Lewis* the 14th are the ſubject of converſation *(a)*

Vie de Colbert.

*P. xxxiv.

Huet Hiſt. du Commerce et de la Navigation des Anciens pref.

Vie de Colbert.

*P. xxxv. L'Honneur Francois. tom. p. 7. 302.

Thus

(a) It was under the adminiſtration of *Colbert*, that the *French* laid the foundation of *Quebeck* on the banks of the river *St. Law-*

This ordinance has had the good fortune to meet with a laborious commentator in *Valin*, who being thoroughly ſenſible of the advantages which his country muſt neceſſarily derive from ſuch an excellent code, has, with a degree of labour and induſtry which excite our admiration, and which are highly deſerving of imitation, placed it in the moſt favourable point of view, has cleared up every obſcurity, by tracing theſe laws to their ancient ſources, and by a full inveſtigation of old ordinances, and the deciſions of former tribunals, has added much to the maſs of learning upon ſubjects of this nature. But of all the ſources, from which modern *French* legiſlators could derive the moſt eſſential information, the famous treatiſe called "*Le Guidon*" was the chief. This tract was republiſhed by *Cleirac*, who pays a due compliment to its merits, in his work upon the Uſages and Cuſtoms of the ſea: and although in its ſtyle and manner it certainly ſavours of the ruſt of antiquity; yet it contains the true * principles of naval juriſprudence. If the ſtyle be antiquated, and the text be corrupted in ſome places, yet the treatiſe is ſtill valuable by the wiſdom, which ſhines through the whole, and the number of deciſions, which it contains.

Cleirac, p. 213.

*P. xxxvi.

Upon this occaſion let me not forget to take proper notice of two very modern and diſtinguiſhed *French* writers, M. *Pothier* and M. *Emerigon*. The former of theſe has written admirable diſſertations upon every ſpecies of expreſs and implied contracts, and amongſt the reſt upon that of inſurance; he has conſidered his various ſubjects with ſo much clearneſs, and perſpicuity, and has produced ſo many appoſite examples in ſupport of the poſitions he advances, that they greatly contribute to the advancement of the knowledge of this branch of juriſprudence. His ſtyle is at the ſame time manly, neat, and claſſical; and well ſuited to didactic diſcourſes.

Pothier, 3 tom. duod. p. 1.

M. *Emerigon* has, in his work, confined himſelf to the conſideration of marine inſurances, and to the contract of bottomry only. This being the caſe, he has gone into thoſe ſubjects much more at length than any former *French* writer; and has with infinite labour, unwearied ſtudy and reflection, collected the deciſions and authorities, applicable to the purpoſe of his work. This learned foreigner, I underſtand, holds a diſtinguiſhed rank among the advocates of his own country: and his treatiſe upon inſurances will by no means diminiſh his fame.

Traite des Aſſurances.

Lawrence; and he performed a work, which, ſays a *French* hiſtorian, even in the eyes of *Richelieu*, ſeemed to ſurpaſs human power; and that was to effect a junction between the *Atlantic* and the *Mediterranean*, by means of a canal, the execution of which attracted the admiration of Europe, and added much to the ſplendour of French commerce.

L'Honneur Francois, pa. M. de Sacy, tom. p. 302.

We have ſeen, that the naval reputation of the *Engliſh* was arrived at a great height in the twelfth century, for the laws of *Oleron*, of the merits of which much has been ſaid, were at that time compiled by an * *Engliſh* monarch, and received here as the regulator of naval affairs. The progreſs of commerce, however, in this country, was not anſwerable to ſo auſpicious a beginning; for in the reign of *Edward* the Third, upwards of a century afterwards, commerce and induſtry were at a very low ebb. That monarch ſtruck with the flouriſhing ſtate of the Northern provinces, which have been already deſcribed, and perceiving the true cauſe of their proſperity, endeavoured to excite a ſpirit of induſtry among his ſubjects, who ſeemed to be blind to the advantages of the ſituation, and ignorant of thoſe ſources, from which they might derive wealth and opulence. So far were they lulled by ignorance and indolence, that they did not even attempt thoſe manufactures, the materials of which they themſelves ſupplied to foreigners. Notwithſtanding the endeavours of *Edward*, and the many wiſe eſtabliſhments propoſed and encouraged by him, it was not till the reign of *Elizabeth*, that the *Engliſh* began to diſcover their true intereſts, and the arts by which they were to obtain that preeminence and rank, which they now hold among commercial nations. This ſlow progreſs of commerce in this country may be accounted for on various grounds During the *Saxon* heptarchy, *England* was ſplit into many kingdoms, perpetually at variance with each other; it was expoſed to the fierce incurſions of the Northern pirates; it was ſunk in barbarity and ignorance; and conſequently was in no condition to cultivate commerce, or to purſue any ſyſtem of wiſe or uſeful policy. To this ſucceeded the *Norman* conqueſt, and all the conſequences of a feudal government, military in its nature, hoſtile to commerce, and the arts and refinements of a liberal and civilized people. Scarce had the nation recovered from the ſhock occaſioned by this revolution, when it was engaged in ſupporting its monarch's pretenſions to the *French* crown, and it long continued to * waſte its vigour and wealth in wild endeavours to conquer that country. To this we may add the deſtructive civil wars between the houſes of *York* and *Lancaſter*, which long deluged the kingdom with blood; and to which a period was at laſt happily put by the union of their ſeveral tides to the crown, in the perſon of *Henry* the Eighth. The reformation then took place under that monarch, and it was not till the reign of *Elizabeth*, that the feuds and diſſenſions which ſuch an important event was likely to occaſion, began to ſubſide. During her long reign, and her wiſe and prudent adminiſtration of government, commerce began to rear its head, and found ſhelter and protection from the managers of public affairs. From this ſhort ſketch, it is not much

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Hume's Hiſt. of Eng. 8vo. edit 2. vol. P. 494.

Robertſon's View of Society, &c.

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much to be wondered at, that *England* was one of the laſt nations of *Europe*, which availed herſelf of her great commercial advantages: but ſhe has ſince made ample amends for her long continued indolence and inactivity, by the amazing extent of her commerce and the wiſe laws and regulations to be found in her ſyſtem of maritime juriſprudence.

While commerce continued in this weak and languid ſtate, it cannot be ſuppoſed that inſurances which ſpring from commerce, were at all encouraged or underſtood. It is true, the *Lombards* came into *England* in the 13th century, and it is univerſally agreed, that whatever may have been the origin of inſurances, they were introduced into *England* by that active and induſtrious people. This idea is countenanced and confirmed by the clauſe to this day inſerted in all policies of inſurance "that this "writing or policy of aſſurance ſhall be of as much force and "effect as any writing heretofore made in *Lombard Street*, &c." * the place where theſe *Italians* are known to have taken up their reſidence, and carried on their trade. The preamble to the ſtatute of Queen *Elizabeth*, which will be preſently mentioned, ſpeaks of inſurances, as having exiſted time out of mind in this kingdom. Be this as it may, it is certain that prior to the reign of that princeſs very few inſurances had be en effected: or, if effected, no queſtion had ever ariſen upon them in any of the ſuperior courts. So little were the judges acquainted with the nature of the contract, that ſo late as the 30 and 31ſt of *Elizabeth*'s reign, it became a queſtion where an action upon a policy of inſurance ſhould be tried, the policy having been effected in *London*, and the ſhip detained in the rive *Soane* in *Franee*. The policy was on a ſhip from *Melcombe Regis*, in the county of *Dorſet*, to *Abbeville*, in *France*. The plaintiff declared, that the ſhip in ſailing towards *Abbeville*, *to wit*, in the river of *Soane*, was arreſted by the king of *France*. The parties came to iſſue upon the queſtion, whether the ſhip was ſo arreſted or not: and it was tried before Lord Chief Juſtice *Wray*, in the city of *London*; and a verdict was found for the plaintiff. In arreſt of judgment it was moved, that this iſſue ariſing merely from a place *out of the realm*, could not be tried in *London*. But it was reſolved by the court, that this iſſue ſhould be tried where the action was in this caſe brought; for the promiſe which is the ground and foundation of the action, was made in *London*; and the arreſt now in iſſue, is not the ground of the action, which is founded on the *aſſumpſit*, and the arreſt is the breach of the *aſſumpſit*.

This is the moſt ancient caſe I have been able to find upon the ſubject of inſurances; and I thought proper to inſert it here, as the beſt proof, that prior to the reign of *Elizabeth*, this contract could have been* very little, if at all known We have ſeen, however, that under *Elizabeth*, the genius of *England* began to diſplay itſelf: about which time alſo the legiſlature began to think

1. Anderſon's Hiſt. of Com.

Vide the Appendix, No. 1.

* P. xxxix

6 Coke Rep. 47 b.

* P. xl.

think the regulation of matters of assurance, an object well worthy their most serious attention; and it cannot but afford us much pleasure to find, that even in that early age, the true principles, upon which this species of contract is founded, and upon which it ought to be protected and encouraged in a commercial nation, were clearly and fully understood. In the preamble to an act of parliament, passed in the 43d year of the reign of Queen *Elizabeth*, concerning matters of assurance used amongst merchants, the sense of the legislature upon the subject is expressed with clearness and perspicuity. After reciting that it has ever been the policy of this nation to encourage trade, and that policies of assurance have existed time out of mind, it goes on to state the advantages to be derived from their encouragement in a commercial nation, "By means of which policies of assurance, "it cometh to pass upon the loss or perishing of any ship, there "followeth not the undoing of any man, but the loss lighteth "rather easily upon many, than heavy upon few, and rather "upon them that adventure not, than upon those who do ad-"venture; whereby all merchants, especially those of the "younger sort, are allured to venture more willingly, and more "freely."

43 Eliz. ch. 12.

The purpose of that statute was, to erect a particular court for the trial of causes, relative to policies of insurance, in a summary way; and to that end the statute ordained, that a commission should issue yearly, directed to the Judge of the *Admiralty*, the Recorder of *London*, two doctors of the civil law, two common lawyers, and eight merchants, empowering any five of them to hear and determine all such causes, arising in **London*; and it also gave an appeal from their decision, by way of bill, to the court of Chancery. But this statute not entirely answering the intention of the legislature, some further regulations were made by a subsequent statute: such as the reduction of the number necessary to constitute a quorum. I forbear entering at length into this matter, the court erected by these statutes being now entirely disused. The reasons of this may be collected from some few decisions in our reporters: but one appears on the face of the statute itself, namely; that its jurisdiction was not sufficiently extensive, being confined to such causes only, *as arose in London*.

* P. xli

13 and 14 Car. 2. ch. 23.

Bendir. v. Oyle, Style, 166.

By a case reported in *Style* we find, that a prohibition issued to the court of Policies of Insurance, to prevent it from proceeding in a case of insurance upon a life, the Court of King's Bench being of opinion, that the statute only meant to give the court below cognizance of *such contracts* only, as related to *merchandize*.

Dalbie v. Proudfoot 1 Show. 396.

In another case it seemed to be the opinion of the Court of King's Bench, that the jurisdiction of this newly erected court did not extend to suits brought by the assurer against the assured; but only to such as were prosecuted by the latter against the former.

er. It is true, in Sir *Bartholomew Shower's* note of the caſe, no deciſion appears to have been made; but a rule to ſhew cauſe why a prohibition ſhould not iſſue, was obtained; and no notice is afterwards taken of it, although the learned reporter was himſelf the counſel in the cauſe, who had obtained the original rule.

But a caſe reported in *Siderfin*, ſeems to have ſtruck a more ſevere blow at the exiſtence of this court than any of thoſe caſes I have mentioned; for it was * there held, that it was no bar to an action upon a Policy of Inſurance at the common law to ſay, that the plaintiff had ſued the defendant for the ſame cauſe, in the court erected by the ſtatute of *Elizabeth*, and that his ſuit was there diſmiſſed. Cam- v. Moy, 2 Siderfin, 121. *P. xlii

Theſe cauſes co-operating, together probably with ſome inſtances of partiality in the judges, this court fell into diſuſe, no commiſſion having iſſued for many years; but inſurance cauſes are now decided, like all other queſtions of property, and by that mode of trial moſt agreeable to the nature of our conſtitution, by a trial in a court of common law. Lex Merc. Red. 4th edit. p. 294.

It has been much the faſhion of late years to inſiſt upon the the advantages which the trading part of the nation would derive from the eſtabliſhment of ſome equitable and amicable judicatory for the trial of all diſputed points in matters of inſurance. This is only another proof of the weakneſs and fallibility of the human mind, which is never ſatisfied with the enjoyments within its reach, however excellent they may be; but pants after thoſe of foreign growth. Thus, a people, who are poſſeſſed of a ſpecies of trial, the beſt calculated for the diſcovery of truth, and the advancement of juſtice, and which has excited the admiration of the world, are deſirous of parting with ſuch an advantage for a mode of trial, which is very unſatisfactory.

The court erected by the ſtatute of *Elizabeth*, and which has now fallen into diſuſe, is perhaps one of the ſtrongeſt arguments, than can be adduced to prove, that ſuch a judicature is not congenial to the ſpirit and diſpoſition of *Britons*, nor well adapted for the purpoſes of its inſtitution. It is univerſally agreed by all writers upon juriſprudence, that nothing tends * ſo much to the elucidation of truth, and the detection of fraud, as the open *viva voce* examination of witneſſes, in the preſence of all mankind; before judges, who from their knowledge of books and men, acquired by long ſtudy and experience, are well qualified to diſcriminate and decide between right and wrong; and before twelve upright citizens, who have an opportunity of obſerving the appearance, countenance, inclination, and deportment of thoſe, who are thus examined upon oath. Beſides the ſubjects of thoſe ſtates, which have eſtabliſhed theſe equitable tribunals, ſenſible of the ſuperior advantages of the *Engliſh* inſtitution, feeling that in great mercantile queſtions, the greateſt attention is paid to the * P. xliii

eternal and immutable principles of reaſon, and that all men, whether natives or foreigners, here meet with an equal meaſure in the adminiſtration of juſtice, fly to this country to make their contracts of inſurance, that in caſe of a diſpute, they may have the benefit of its laws. Did it fall within the compaſs of this enquiry, I could relate many caſes, of the truth of which I have not the ſmalleſt reaſon to doubt, which would ſerve to ſhew the idea entertained by foreigners of our mercantile juriſprudence, and the high repute and eſtimation in which our judges are juſtly held by the *European* nations.

But though the court of Policies of Aſſurance has been long diſuſed; though it is near a century ſince queſtions of this nature became chiefly the ſubject of common law juriſdiction; yet, I am ſure I rather go beyond bounds, if I aſſert that in all our reporters from the reign of Queen *Elizabeth*, to the year 1756, when Lord *Mansfield* became Chief Juſtice of the King's Bench, there are 60 caſes upon matters of inſurance. Even thoſe caſes, which are reported, are ſuch looſe notes, moſtly of trials at *Niſi Prius*, * containing a ſhort opinion of a ſingle judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the ſubject. From hence it muſt neceſſarily follow, that as there have been but few poſitive regulations upon inſurances, the principles, on which they were founded, could have never been widely diffuſed, nor very generally known.

* P. xliv

This was owing to ſome defects, which were diſcoverable in the proceedings in our courts, and in the delays and expences which ſuitors experienced; ſo that they rather choſe to ſubmit to their firſt loſs, than be harraſſed by the delays of the law, or be at the expence of trying a queſtion, of which the deciſion might perhaps be of leſs moment to the individual, than to the public. Theſe defects were ſo glaring, that it was one of the firſt acts of Lord *Mansfield's* adminiſtration to apply a remedy; and his labours have been happily attended with ſuch ſucceſs, that they have been of eſſential ſervice to the nation in general, conſidered in a commercial light, and have excited the applauſe and approbation of *Europe*.

Before the time of this venerable judge, the legal proceedings even on contracts of inſurance, were ſubject to great vexations and oppreſſions. If the under-writers refuſed payment, it was uſual for the inſured to bring a ſeparate action againſt each of the under-writers on the policy, and to proceed to trial on all. The multiplicity of trials was oppreſſive both to the inſurers and inſured: and the inſurers, if they had any real point to try, were put to an enormous expence, before they could obtain any deciſion of the queſtion, which they wiſhed to agitate. Some under-writers who thought they had a ſound defence, and who were deſirous, of avoiding unneceſſary coſts or delay * to themſelves or

* P. xlv

the

the inſured, applied to the court of King's Bench to ſtay the proceedings in all the actions but one, undertaking to pay the amount of their ſubſcriptions with coſts, if the plaintiff ſhould ſucceed in the cauſe, which was tried; and offering to admit on their part every thing, which might bring the true merits of the caſe before the court and jury. Reaſonable as this offer was, the plaintiff, either from perverſeneſs of diſpoſition, or the illiberality and cunning of his adviſers, refuſed his conſent to the application. The court did not think themſelves warranted to make ſuch a rule without his conſent: but Mr. Juſtice *Deniſon* intimated that if the plaintiff perſiſted againſt his own intereſt, in his right to try all the cauſes, the court had the power of granting imparlances in all but one, till there was an opportunity of trying that one action. Lord *Mansfield* then ſtated the great advantages reſulting to each party by conſenting to the application, which was made; and added, that if the plaintiff conſented to ſuch a rule, the defendant ſhould undertake not to file any bill in equity for delay, nor to bring a writ of error, and ſhould produce all books and papers, that were material to the point in iſſue. This rule was afterwards conſented to by the plaintiff, and was found ſo beneficial to all parties, that it is now grown into general uſe; and is called The Conſolidation Rule. Thus on the one hand, defendants may have queſtions of real importance tried at a ſmall expence; and plaintiffs are not delayed in their ſuits by thoſe arts, which have too frequently been reſorted to, in order to evade the payment of a juſt demand.

2 Barnard. B. R. 103.

In former times, the whole of the caſe was left generally to the jury, without any minute ſtatement from the bench of the principles of law, on which * inſurances were eſtabliſhed; and as the verdicts were general, it is almoſt impoſſible to determine from the reports we now ſee, upon what grounds the caſe was decided. Nay, even if a doubt aroſe in point of law, and a caſe was reſerved upon that doubt, it was afterwards argued in private at the chambers of the judge, who tried the cauſe, and by his ſingle deciſion, the parties were bound. Thus whatever his opinion might be, it never was promulgated to the world; and could never be the rule of deciſion in any future caſe.

* P. xlvi

Lord *Mansfield* introduced a different mode of proceeding; for in his ſtatement of the caſe to the jury, he enlarged upon the rules and principles of law, as applicable to that caſe; and left it to them to make the application of thoſe principles to the facts in evidence before them. So that if a general verdict were given, the grounds, on which the jury proceeded, might be more eaſily aſcertained. Beſides, if any real difficulty occurred in point of law, his Lordſhip adviſed the counſel to conſent to a ſpecial caſe. In a ſpecial caſe, the facts are either admitted by the parties, or if they are diſputed, are proved; and then the judge takes the opi-

opinion of the jury upon thoſe facts, reſerving the queſtion of law to be agitated elſewhere. Theſe caſes are afterwards argued, not before the judge in private, but in open court before all the judges of the bench from which the record comes. Thus nice and important queſtions are now not haſtily and unadviſedly decided; but the parties have their caſe ſeriouſly conſidered and debated by the whole court; the deciſion becomes notorious to the world; it is recorded for a precedent of law ariſing from the facts found, and ſerves as a rule to guide the opinions of future judges.

* P. xlvii *It had alſo been the cuſtom, when caſes were reſerved, to leave it to the counſel on both ſides to draw them up at their leiſure. This introduced conſiderable delays; for every fact became again a ſubject of diſpute; and frequently from the hurry of buſineſs and other avocations of the counſel, the caſe was neglected for a conſiderable time, before it was ready for the inſpection of the court.

Now, whenever a caſe is reſerved, the judge himſelf dictates to the clerk of the court, the facts which ought to be ſtated, and the queſtion, upon which the opinion of the court is required: and in addition to this, Lord *Mansfield*, whoſe rules are now the ſubject of our enquiry, ordered, that all caſes ſo reſerved muſt be ſet down for argument within the firſt four days of the term following the trial; otherwiſe the judgment muſt be entered, according to the finding of the jury.

Raynard v. Chaſe, 1 Burrow 5.

One additional improvement in the proceedings remains to be mentioned. Before Lord *Mansfield*'s time, it was almoſt a matter of courſe not to decide any caſe, without hearing two arguments upon it: but in the very firſt cauſe, which is reported of his Lordſhip's deciſions, he expreſſed himſelf to this effect: "Where we have no doubt, we ought not to put the parties to "the delay and expence of a farther argument, nor leave other "perſons, who may be intereſted in the determination of a point "of a general nature, unneceſſarily under the anxiety of ſuſ-"penſe." When we add to theſe wiſe regulations the conſideration that Lord *Mansfield*, during his long adminiſtration of juſtice, has given up a great part of his time, and has employed his talents in the elucidation of thoſe points, which tend to fix the ſyſtem of * mercantile juriſprudence upon the ſureſt grounds, we need not wonder that that part of it, which relates to marine inſurances, has attained to its preſent ſtate of perfection.

* P. xlviii

A complete ſyſtem of juriſprudence cannot be ſuddenly erected: but there is rather matter to excite our wonder that ſo much has been done in this reſpect within the laſt thirty years, than ground to complain that little has been effected. It is the boaſt of this age, that in it the great foundations of marine juriſprudence have been laid, by clearly developing the principles, on which policies of inſurance are founded, and by happily applying thoſe prin-

principles to particular cases It will be the business of the following work, which professes to lay down a system of the law, as it now stands, to point out, amongst other things, the improvements which have been made by the legislature from time to time on the system of insurances, by many wise statutes, and salutary restrictions; and to prove, that the learned judges of the courts both of law and equity, by their liberal and equitable constructions of those statutes, and by adopting the true principles of commerce in their decision of the many intricate cases, which have been brought before them, have added another pillar to that beautiful structure of rational jurisprudence, which has deservedly acquired the admiration of mankind.

*CHAPTER THE FIRST. *P. 1

OF THE POLICY.

POLICY is the name given to the inſtrument, by which the contract of indemnity is effected between the inſurer and inſured; and it is not, like moſt contracts, ſigned by both parties, but only by the inſurer, who on that account, it is ſuppoſed, is denominated an underwriter. Notwithſtanding this, there are certain conditions, of which we ſhall hereafter have occaſion to ſpeak, to be performed as well by the perſon not ſubſcribing, as by the underwriter, otherwiſe the policy will be void. Of policies there ſeem to be two kinds, *valued* and *open* policies; and the only difference between them is this, that in the former, goods or property inſured are valued at prime coſt, at the time of effecting the policy; in the latter, the value is not mentioned: that in the caſe of an open policy, the real value muſt be proved; in a valued policy it is *agreed*, and is juſt as if the parties had admitted it at the trial. CHAP. I. 2 Burr. 1117.

Although policies of aſſurance are not to be ranked with ſpecialty contracts, not being under ſeal, yet they have always been held as ſacred agreements, and of the firſt credit: ſo much ſo, that when once they are underwritten, they can never be altered by any authority whatever; becauſe it would open a door to an infinite variety of frauds, and introduce uncertainty into a ſpecies of contract, of which certainty and preciſion are the moſt eſſential requiſites. Skinn. 54.

In a caſe before Lord Chancellor *Hardwicke*, this doctrine, was admitted in its full extent. The plaintiff had inſured a ſhip at and from *London* to *Oſtend*, from thence to *Rotterdam*, from thence to the *Canaries*, warranted an *Oſtend* ſhip, which * ſhip was afterwards taken. The bill was brought to have the policy rectified, for that the intention of the parties was miſtaken therein, which was, that the warranty was too general, and that the voyage ſhould have been ſtated to take place from *Oſtend* only, and not from *London*. The evidence in this caſe was the depoſition for *Knox*, the agent of the company, who Henkle v. The Royal Exch. Aſſur. Company. 1 Vez. 317. * P. 2

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depoſed, that the plaintiff applied to him to inſure the ſhip, and that he believed the plaintiff told him, ſhe was, or had been an *Engliſh* ſhip, and might ſay ſomething concerning the manner or intent of making her an *Oſtend* ſhip; but that his anſwer was, that he would not enter into the manner, but that if the plaintiff would warrant her to be an *Oſtend* ſhip, he would inſure; and that on thoſe terms, and no other, the agreement was made. There was the evidence of another perſon, who varied from *Knox*; in addition to which it was ſaid, there was the evidence ariſing from circumſtances, for that it was impoſſible for the plaintiff to intend to inſure her as an *Oſtend* ſhip, ſhe being then in *London*, and could not be an *Oſtend* ſhip without going to *Oſtend*; for which proof was read that it was neceſſary ſhe ſhould be regiſtered.

Lord *Chancellor*.—The firſt queſtion is, whether it ſufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement. It is certain, that to come at that, there ought to be the ſtrongeſt proof poſſible, for the agreement is twice reduced into writing in the ſame words, and muſt have the ſame conſtruction: and yet the plaintiff ſeeks, contrary to both theſe, to vary them, and that in a caſe, where his witneſſes vary from each other. The ſingle depoſition, upon which it depends, is very uncertain; and imports, that they relied on the plaintiff's warranty, leaving the tranſaction relating to the manner of making her an *Oſtend* ſhip entirely to himſelf. His Lordſhip, therefore, as there was no evidence to vary the contract from the written words, ordered the bill to be diſmiſſed.

At the ſame time it muſt be obſerved, that caſes frequently may, and do exiſt, in which a policy, upon proper evidence, may be altered, without any violation of the principles above
* P. 3 * laid down, which has been often done by the courts both of law and equity; for let it be remembered once for all, that in queſtions of inſurance, which is a contract founded upon broad equitable principles, courts of common law are bound by the ſame rules of deciſion as courts of equity. After ſigning, policies are likewiſe frequently altered by *conſent* of the parties, and ſuch policies are good, agreeably to the maxim, *conſenſus tollit errorem*.

Motteux v. the Gov. and Comp. of the London Aſſurance, 1 Atkyns 545.

An inſtance of the former kind of alteration of a policy occurs in the Chancellorſhip of Lord *Hardwicke*, to whoſe deciſion we laſt referred. The inſurance was upon the ſhip five hundred pounds, and the policy ſtated, that the adventure was to commence immediately *from the departure of the ſhip from Fort St George to London*. The bill was brought by the plaintiff, ſuggeſting that the owner had employed a Mr. *Halhead* to inſure the ſhip with the defendants, to commence *from her arrival at Fort*

Fort St. George; that a label, agreeable to those instructions, with all the particulars of the agreement, had been entered in a book, and subscribed by *Halhead*, and two of the directors of the company; that by a *mistake* the policy was made out different from the label; that the ship being lost in the bay of *Bengal*, *after* her arrival at *Fort St. George*, but *before* her departure from *England*, the company refuse to pay; upon these suggestions, the plaintiff prayed that the mistake might be rectified, and that the company might be ordered to pay five hundred pounds with interest.

His Lordship was of opinion, that the label was a memorandum of the agreement, in which the material parts of the policy were inserted; that although the policy was ambiguous, the label made it clear; and as it was only a mistake of the clerk, it ought to be rectified according to the label.

In an action upon a policy of insurance, and *non assumpsit* pleaded, the facts were, that *Stubbs*, a broker, had instructions to procure an insurance on goods on board the *Mary Galley*, *of Saint Christophers*, *Captain A. Hill*, *commander*: that *Stubbs*, in writing the policy, by mistake, made the insurance on the *Mary*, *Captain Hastwood*, *Commader*, which was subscribed by the defendant: that the *Mary Galley* was lost, and then *Stubbs* applied to the insurers to consent to alter the policy, to which they agreed. It was urged, that on account of the alteration, the defendant should have an increase of premium, the ship *Mary* being stouter than the *Mary Galley*. But *Holt*, chief justice, ruled, that the action well lay upon the policy, and that the mistake might be set right. Bates v. Grabham, Salk. 444. * P. 4

A policy of insurance, when effected, becomes the property of the insured; and if it be *wrongfully* withheld, either by the broker employed by him to effect it, or by any other person to whose hands it may happen to come, he may maintain an action of trover for it, as well as for any other species of property.

Thus an action of trover was brought against the defendants for two policies of insurance. The defendants were brokers who had written to the plaintiff, the master of a vessel, that they had got two policies effected; the one on account of the plaintiff's cloaths and wages, the other on account of the owners, and that the underwriter was Mr. *Newnham*. A loss having happened, the defendants produced a policy, underwritten by one *J. S.* only insuring the ship, in which the plaintiff had no interest. Harding v. Carter, and another: sittings at Guildhall. Easter vacation, 1781.

Lord *Mansfield*.—I shall consider the defendants as the actual insurers, and therefore the plaintiff must prove his interest and loss. The defence set up was, that the letter above stated in evidence was written by the defendant's clerk through mistake; and it was said, that trover could not be maintained for that which never existed: but his Lordship would not suffer the de-

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fendants now to contradict their own repreſentation; and the plaintiff accordingly had a verdict to the amount of his intereſt, the premium being deducted.

It is material to obſerve, that policies of inſurance, though called *written* inſtruments, are, for the convenience of trade, and the diſpatch of buſineſs, generally printed, leaving blanks for the inſertion of names and all other requiſites. This being the caſe, it is frequently neceſſary to inſert written clauſes, in order to expreſs the meaning of the parties to the contract, which, from ſome particular circumſtances, the printed form * may not ſufficiently explain. Theſe written clauſes and conditions, thus inſerted, are to be conſidered as the real contract; the court will look to them to find out the intention of the parties, and will conſequently ſuffer ſuch conditions to controul the printed words in policies of inſurance

* P. 5

Having premiſed thus much of policies in general, it may be proper to conſider this ſubject in a threefold point of view: Firſt, what perſons may be inſurers; Secondly, what things may be inſured; Thirdly, what the requiſites of a policy are.

1ſt. What perſons may be inſurers. It ſhould ſeem, that by the common law and uſage of merchants, any perſon whatever might be an inſurer, however unable he might be, from poverty to make up the loſſes inſured againſt, provided the merchant was weak enough to truſt to ſuch a ſecurity. In proceſs of time, however, there were ſo many who made a ſhew of great wealth, in order to deceive the honeſt and unſuſpicious trader out of his premiums, and who were in inſolvent circumſtances, that it became an object of national concern, and parliamentary interference. The miſchiefs then exiſting in this branch of trade, and the dangerous conſequences thence ariſing to the intereſt of the country, are to be collected from the preamble of the ſtatute, which paſſed in the reign of *George* the Firſt, to remedy theſe evils, and which has in ſome, though not in any great degree, reſtrained the rule of the common law as to the unlimited right any man or body of men had to become inſurers.

6 George 1, c. 18.

" Whereas it has been found by experience, that many particu-
" lar perſons, after they have received large premiums or con-
" ſideration monies for or towards the inſuring of ſhips,
" goods, and merchandizes at ſea, have become bankrupts, or
" otherwiſe failed in anſwering or complying with their policies
" of aſſurance, whereby they were particularly engaged to make
" good, or contribute towards the loſſes which merchants and
" traders have ſuſtained, to the ruin and impoveriſhment of
" many merchants and traders, and to the diſcouragement of
" adventurers at ſea, and to the great diminution of the trade,
" wealth, ſtrength, and public revenues of the kingdom: and
" whereas it is conceived, that if two ſeveral and diſtinct corpo-
" rations, with a competent joint ſtock to each of them belong-
" ing,

" * ing, and under proper conditions, reſtrictions, and regulati- CHAP.
" ons, were erected and eſtabliſhed for aſſurance of ſhips, I.
" goods, or merchandizes at ſea, or going to ſea, (excluſive of
" all or any other corporations or bodies politick already created, * P. 6
" or hereafter to be created, and likewiſe excluſive of
" ſuch ſocieties or partnerſhips as now are, or may here-
" after be entered into for that purpoſe) ſeveral merchants
" or traders, who adventure their eſtates, or part of their
" eſtates, in ſuch ſhips, goods, and merchandizes, at ſea,
" or going to ſea, (eſpecially in remote and hazardous voyages)
" would think it much ſafer for them to depend upon the policies
" or aſſurances of either of thoſe two corporations, ſo to be
" erected and eſtabliſhed, than on the policies or aſſurances of
" private or particular perſons." The ſtatute then goes on to authorize his majeſty to grant charters to two diſtinct companies or corporations, for the inſurance of ſhips, goods, and merchandizes, at ſea or going to ſea, and for lending money on bottomree. The ſtatute alſo enacts that the corporations may purchaſe lands, to the amount of one thouſand pounds *per annum*, may have a common ſeal, and may be capable to ſue and be ſued at law; that each corporation ſhall provide a ſufficient ſtock of ready money to ſatisfy and diſcharge all juſt demands, ariſing upon their policies of inſurance; and in caſe of refuſal, the parties inſured may bring their action againſt the corporation, and ſhall recover *double* damages and coſts. This clauſe however, giving double damages, was afterwards thought by the legiſlature to be hard and oppreſſive; and therefore by a clauſe in a ſubſequent ſtatute, theſe corporations were allowed to plead the general iſſue to any action brought againſt them, and the jury, in eſtimating the damages, as well with reſpect to them as any other perſons, were left to their own diſcretion.

8 Geo. 1. c. 15. ſ. 25. 11 Geo. 1 c. 30. ſ. 43

Vide poſt c. 20.

After ſeveral other clauſes for the internal regulation of theſe corporations, the ſtatute of the ſixth of *Geo.* the Firſt goes on to prohibit any other ſociety or partnerſhip whatſoever from making inſurances, or lending money on bottomree. " And be Sec. 12.
" it enacted, that from and after the granting or making the
" ſaid charters or indentures for erecting the two corporations
" before mentioned, and paſſing the ſame under the great ſeal,
" for and during the continuance of the ſaid corporations
" reſpectively, or either of them, all other corporations or bo-
" * dies politick, before this time erected or eſtabliſhed, or here- * P. 7
" after to be erected or eſtabliſhed, whether ſuch corporations
" or bodies politick, or any of them, be ſole or aggregate, and
" all ſuch ſocieties and partnerſhips as now are, or hereafter
" ſhall or may be, entered into by any perſon or perſons, for
" aſſuring ſhips or merchandizes at ſea, or for lending money
" on bottomree, ſhall, by force and virtue of this act, be
" reſtrained from granting, ſigning, or underwriting any

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" policy of assurance, or making any contracts for assurance o
" or upon any ship or ships, goods, or merchandizes, at sea
" or going to sea, and for lending any monies by way of bot-
" tomree as aforesaid: and if any corporation or body politick,
" or persons acting in such society or partnership (other than
" the two corporations intended to be established by this act,
" or one of them) shall presume to grant, sign, or underwrite,
" after the twenty-fourth day of *June*, 1720. any such policy
" or policies, or making any such contract or contracts for assu-
" rance of or upon any ship or ships, goods or merchandizes,
" at sea or going to sea, or take or agree to take any premium
" or other reward for such policy or policies, every such policy
" and policies of assurance of or upon any such ship or ships,
" goods or merchandizes, shall be *ipso facto* void, and all and
" every such sum or sums so signed and underwritten in such
" policy or policies shall be forfeited, and shall and may be
" recovered, one half to the use of his majesty, the other to
" that of the informer, by action: and if any corporation or
" bodies politick, or persons acting in such society or partner-
" ship, other than the two corporations intended to be erected
" by this act, or one of them, shall presume to lend, or agree
" to lend, or advance, by themselves or any others on their
" behalf, after the said twenty-fourth day of *June* 1720. any
" money by way of bottomree contrary to this act, the bond or
" other security for the same shall be *ipso facto* void, and such
" agreement shall be adjudged to be an usurious contract, and
" the offenders therein shall suffer as in cases of usury: never-
" theless it is intended and hereby declared, that any private or
" particular person or persons shall be at liberty to write or
" underwrite any policies, or engage himself or herself in any
" assurances of, for, or upon any ship or ships, goods or mer-
" chandizes at sea, or going to sea, or may lend money by
" way of bottomree, as fully and beneficially, as if this act
" * had never been made, so as the same be not on the account
" or risque of a corporation or body politick, or upon the
" account or risque of persons acting in a society or partner-
" ship for that purpose as aforesaid."

* P. 8

Sullivan v. Graves. Sittings after Easter 1789.

Upon this clause of the statute, a question lately arose at *Guildhall*. It was an action brought against the defendant to recover a sum of money received by him from one *Bristow* to the plaintiff's use. The plaintiff was an underwriter, and the defendant was a broker; and a loss having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it: but *Bristow*, having agreed to take half the plaintiff's risk, had paid his moiety of the loss into the hands of the defendant, to recover it from whom this action was brought.

Lord *Kenyon*, C. J. " I am of opinion that the plaintiff cannot recover; for this is clearly a partnership within the act

of

of parliament. If a ſingle name appears upon the policy, as in this caſe, the inſurer ſhall never be allowed, if a loſs happen, to defeat a *bonâ fide* inſurance, by ſaying to an innocent perſon, there was a ſecret partnerſhip between another and myſelf; and therefore the policy is void. But here the plaintiff is himſelf the underwriter, who comes to enforce an illegal contract: it is a partnerſhip *pro hac vice*: and this party cannot apply to a Court of Juſtice to enforce a contract founded in a breach of the law."

No motion was ever made to ſet aſide the nonſuit: but two or three days after, Lord *Kenyon* took occaſion to mention to the Bar, that he had ſtated the caſe to the other Judges of the Court of *King's Bench*, who were unanimouſly of the ſame opinion with his Lordſhip.

There are clauſes, in a ſubſequent part of the ſtatute, ſecuring to the *South Sea* and *Eaſt India* Companies, all the rights and privileges which they had enjoyed previous to the paſſing of that act, and the right of lending money on bottomree to the captains of their own ſhips. Sec. 24. 26. 28.

This ſtatute is the only poſitive regulation to be found in the law of this country, with reſpect to what perſons ſhall, or ſhall not be inſurers. By virtue of that regulation, the two offices under the names of the *Royal Exchange Aſſurance* Office, and *the *London Aſſurance* Office were created and eſtabliſhed, by charter of *George* the Firſt, under the great ſeal of *Great Britain*, bearing date the twenty-ſecond day of *June*, in the ſixth year of his reign; and they ſtill continue offices for the inſurance of property. The legiſlature having thus anxiouſly provided for the ſecurity of thoſe merchants, who might be deſirous of carrying on an extenſive trade, but who were deterred from doing ſo, thro' fear of the inſolvency of underwriters, having ſtipulated with the company that they ſhould have ſufficient funds for the payment of all demands that might be made, and at the ſame time, allowing to private underwriters the full liberty of inſuring to any amount with thoſe who were ſatisfied to truſt to their private ſecurities only; it is not to be wondered at, that the buſineſs of inſurance increaſed to a degree almoſt inconceivable. Indeed, any perſon, ſince this ſtatute, may inſure as at the common law, with this ſingle exception, that any policy ſubſcribed by a private firm or partnerſhip, is abſolutely void. * P. 9

2dly. What things may be inſured. I beg leave here to premiſe, that I do not mean at preſent to go into the great queſtion of inſurance, *upon intereſt or no intereſt*, having reſerved that for the ſubject of a diſtinct chapter. My deſign in this place is only to ſhew, what kinds of property are the ſubject of inſurance, upon ſuppoſition that every perſon, making inſurance, is intereſted in the goods as the law requires.

The

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The moſt frequent ſubjects of inſurance are ſhips, goods, merchandizes, the freight or hire of ſhips: alſo houſes, warehouſes, and the goods laid up in them from danger by fire, and inſurance on lives. Of the two laſt of which, more will be ſaid hereafter. But although inſurances upon ſuch property, as we have juſt enumerated, moſt frequently occur in practice; yet in the law books we meet with caſes which can hardly fall within any of thoſe deſcriptions.

1 Magens 4

Thus bottomree and *reſpondentia* are a particular ſpecies of property which may be the ſubject of inſurance. But then it muſt be particularly expreſſed in the policy to be *reſpondentia* intereſt; for under a general inſurance on *goods*, the party inſured cannot recover money lent on bottomree. Such has been, and is at this day, the eſtabliſhed uſage of merchants.

* P. 10

This was ſolemnly decided in an action upon a policy of inſurance "upon *goods and merchandizes*, loaden, or to be loaden "aboard the *Denham, William Tryon*, commander, at and from "*Bengal*, to any ports or places whatſoever in the *Eaſt Indies*, "until her ſafe arrival in *London*." The evidence appeared to be, that before the ſigning of the policy, the plaintiff had lent Captain *Tryon, upon the goods*, then loaden, and to be loaden on board the ſaid ſhip, on account of the ſaid Captain *Tryon*, the ſum of ſeven hundred and ſixty four pounds, at *reſpondentia*, for which a bond was executed in the uſual form: that the ſhip, at the time of the loſs had goods and merchandizes on board, the property of Captain *Tryon*, of greater value than all the money he had borrowed: that the ſhip was afterwards burnt, and all the goods and merchandizes were totally conſumed and loſt. Upon theſe facts, the queſtion was, whether the plaintiff could recover. This caſe was twice argued at the bar; the court took time to conſider it, and were unanimous in their determination.

Glover v. Black, 3. Burrow 1394, and 1. Black-ſtone Rep. 405.

Lord *Mansfield*.—I inclined at the trial, and ſince upon the argument, to ſupport this inſurance, being convinced that it is fair, and, that the doubt has ariſen by a ſlip in omitting to ſpecify (as it was intended to have been done) that this was a *reſpondentia* intereſt. The ground of ſupporting this inſurance, if it could have been ſupported, was a clauſe of the 19 *G.* 2 c. 37. *ſ.* 5. which, as to the purpoſe of inſurance, conſiders the borrower as having a right to inſure only for the ſurplus value, over and above the money he has borrowed at *reſpondentia*. Yet we are all ſatisfied that this act of parliament never meant, or intended to make, any alteration in the manner of inſurances, its view was to prevent gaming or wagering policies, where the inſurer had no intereſt at all; and if the lender of money at *reſpondentia* were to be at liberty to inſure for more than his whole intereſt, it would be a gaming policy; for it is obvious, that if he could inſure all the goods, and inſure his *reſpondentia* intereſt

reſt beſides, this would amount to an inſurance beyond his whole intereſt. In deſcribing *reſpondentia* intereſt, the act gives the lender *alone* a right to make inſurance on the money lent: ſo that the act left it on the practice. I have looked into the practice, and I find that bottomree and *reſpondentia* are a *particular ſpecies* of inſurance in themſelves, and have taken a particular denomination, I cannot find even a *dictum* in any writer foreign or domeſtic, that the *reſpondentia* creditor may inſure upon the *goods*, *as goods*. I find too, by talking with intelligent perſons very converſant in the knowledge and practice of inſurances, that they always do mention *reſpondentia* intereſt, whenever they mean to inſure it. It might be greatly inconvenient to introduce a practice *contrary to general uſage*, and, there may be ſome opening to fraud if it be not ſpecified. The ground of our reſolution is, "That it is now eſtabliſhed, as the law and "practice of merchants, that *reſpondentia* and bottomree muſt "be ſpecified and mentioned in the policy of inſurance."

* P. 11

It is to be obſerved, that in this judgment the court confined itſelf entirely to the caſe then before it, but did not mean to decide, that a perſon, having a ſpecial intereſt in goods, could not recover under an inſurance upon goods generally. Lord *Mansfield*, indeed, expreſsly ſaid, at the concluſion of his argument, that they did not mean to determine, that no ſpecial intereſt in goods might be given in evidence, in other caſes than in thoſe of *reſpondentia* and bottomree, if the circumſtances of the caſe ſhould happen to admit of it. The lien which a factor, to whom a balance is due, has upon the goods of his principal, comes under the exception taken by the court; and an inſurance upon ſuch an intereſt ſeems to have been admitted, if not abſolutely held, to be good, in the caſe of *Godin* v. *London* Aſſurance Company, which will be fully ſtated in that part of this work, which treats of double inſurances.

3 Bur. 1401.

1 Burr. 489.

But although the caſe of *Glover* and *Black* is certainly good law, yet it has ſince been ruled, that money expended by the captain for the uſe of the ſhip, and for which *reſpondentia* intereſt was charged, may be recovered under an inſurance on *goods*, *ſpecie*, *and effects*, provided the uſage of the trade, which in matters of inſurance is always of great weight, ſanctions it.

Thus in an action upon a policy of inſurance *on goods*, *ſpecie*, *and effects* of the plaintiff, who was alſo the captain on board the ſhip, the plaintiff claimed under that inſurance, money expended by him in the courſe of the voyage for the uſe of the ſhip, and for which he charged *reſpondentia* intereſt.

Gregory v. Chriſtie B. R. Trinity 24 Geo. 3, * P. 12

Lord *Mansfield*, after delivering his opinion upon another point, which aroſe in the cauſe, and which will be mentioned in another part of this work, ſaid, as to the ſecond queſtion, whe-

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whether the words "*goods, ſpecie, and effects*" extended to this intereſt, I ſhould think not, if we were only to conſider the words made uſe of. But here there is *an expreſs uſage*, which muſt govern our deciſion. A great many captains in the *Eaſt India* ſervice ſwear, that this kind of intereſt is always inſured in this way, and I obſerve the perſon here inſured is the *captain*.

1 Magens 18.

By the marine regulations of moſt, if not of all, the trading powers in *Europe*, inſurances upon the wages of ſeamen are forbidden; a regulation founded in wiſdom and ſound policy. In *Great Britain*, a great and commercial nation, ſuch an ordinance is particularly neceſſary, and it is agreeable to the policy of the general law of that country, by which it is declared, "that no maſter or owner of any merchant ſhip ſhall "pay to any ſeaman, beyond the ſeas, any money or effects on "account of wages, exceeding one moiety of the wages due, "at the time of ſuch payment, till ſuch ſhip ſhall return to "*Great Britain*, or *Ireland*." By this ſalutary law, the ſailors are intereſted in the return of the ſhip; they will, on that account, be prevented from deſerting it when abroad, from leaving it unmanned, and in times of danger, ariſing either from perils of the ſea, or the attacks of an enemy, will be more anxious for its preſervation. But theſe good effects would be entirely defeated, if inſurance on their wages were to be permitted; for to whatever cauſe the loſs might be attributed, they would ſtill be ſecure. However it ſhould ſeem, that this regulation does not mean to prevent mariners from inſuring thoſe wages, which they are entitled to receive abroad, or goods which they have purchaſed with thoſe wages in order to bring them home; but, in ſuch a caſe, they are to be conſidered in the ſame light with other men.

Geo. 1. ch. 24. §. 7.

1 Magens 19.

In an action upon a policy of inſurance upon *Fort Marlborough*, otherwiſe *Bencoolen*, in the *Eaſt Indies*, for twelve calendar months, from the firſt of *October*, 1759, to the firſt of *October*, 1760, againſt any *European* enemy, for the benefit of the governor, it was doubted by the learned chief juſtice who tried that cauſe, whether a policy againſt the loſs of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a ſailor to inſure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cauſe, after mentioning this doubt, which had occurred to his mind, he went on thus: "But, conſidering that this place, though called a fort, was "really but a factory or ſettlement for trade; and that he, "though called a governor, was really but a merchant.—Con- "ſidering too, that the law allows a captain of a ſhip to inſure "goods which he has on board, or his ſhare in the ſhip, if he "be a part owner; and the captain of a privateer, if he be a part

* P. 13 Carter v. Boehm, 3. Burr. 1905. and 1 Black. 593. Lord Mansfield.

" part owner, to insure his share; considering too, that the " objection could not, upon any ground of justice, be made by " the insurer, who knew him to be the governor, at the time " he took the premium; and as with regard to principles of " publick convenience, the case so seldom happens, (I never " knew one before) any danger from the example is little to be " apprehended, I did not think myself warranted, upon that " point, to nonsuit the plaintiff; especially too, as the objection " did not come from the bar. Though this point was " mentioned, it was not insisted upon at the last trial; nor has " it been seriously argued, upon this motion, as sufficient alone " to vacate the policy: and if it had, we are all of opinion, " that we are warranted to say, that it is void upon that " account."

It has long been a question, how far insurances upon the ships or goods of enemies are politick or legal. Upon the continent of *Europe* it should seem, that they are in general absolutely prohibited, under penalty of the insurance being void, and the delinquent's forfeiting the sum, to which he had subscribed. These laws have been passed from an idea, that such insurances are prejudicial to the interests of the country tolerating such contracts, by enabling an enemy to continue his trade, on account of the degree of protection, thus afforded him against the maritime strength of the nation making the insurance. A similar spirit at one time prevailed in the *British* parliament, and a bill was introduced in the year one thousand seven hundred and forty eight, " to prevent assurances on ships " belonging to *France*, and on merchandize and effects laden " thereon, during the then existing war with *France*." Although this act was opposed on principles of policy, by the two greatest lawyers and most eminent speakers of that age, the Honourable *William Murray* and Sir *Dudley Ryder*; yet it was deemed expedient at that time that the bill should pass, inflicting a penalty of five hundred pounds upon the persons making such insurances, and also declaring the policy to be void.

Ord. of Stockholm, Bynkershoek's Quest. Juris public. lib. 1 c. 21, p. 15.

* P. 14

Deb. in H. Com. vol. 1. p. 107.

21 Geo. 2. c. 4.

The existence of that act, however, was limited by the duration of the then war; and although several attempts have since been made to introduce a similar law, yet they have always proved fruitless, the best proof, perhaps, that can be given of the impolicy of the measure. Indeed the policy of such contracts seems to have been admitted by Lord *Hardwicke* in a case before him in chancery; and Lord *Mansfield* has frequently declared in parliament, and on the bench, that he thinks such insurances should be encouraged, because there is a certain profit derived from the premiums; and frequently important intelli

2 Vez. 320.

Gist. v. Mason, Sit. at Guildhall Mich. v. ac. 1785,

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telligence has been, by ſuch means, obtained of the enemy's deſigns. (*a*)

However, ſince that time, one ſpecies of inſurance on foreign ſhips or goods has been prohibited by ſtatute, with a view to ſecure to the *Eaſt India* company the ſole trade to and from the *Eaſt Indies*, and other places, beyond the *Cape of good Hope*. The ſtatute, after reciting, that to admit of inſurances on the ſhips or veſſels of foreigners trading to the *Eaſt Indies*, may be a means of encouraging his majeſty's ſubjects to ſhare with foreigners, in eſtabliſhing new ſocieties or companies for carrying on the ſaid trade in the dominions of foreign ſtates or princes, enacts, "That no inſurances ſhall be made, or money "lent on bottomree, on foreign ſhips or goods, bound to or "from the *Eaſt Indies*, under the forfeiture of treble the ſum in-"ſured or lent." It contains an exception, however, in favour of inſurances made, or to be made, on ſhips of the ſubjects of ſuch ſovereigns, as carried on a trade with that part of the world, previous to the month of *October*, 1748. This act was to be in force for ſeven years. Whether upon a trial it was found to be a politick or wiſe regulation, I have not been able to diſcover: but the preſumption is to the contrary; as it does not appear from the ſtatute book, that this act of parliament was continued, or that it was revived by any ſubſequent ſtatute.

25 Geo. 2. c. 26.

• P. 15

3dly. Of the requiſites of a policy. The form of a policy, now uſed in *London*, is nearly the ſame which was adopted two hundred years ago, as may be collected from *Malyne*; but its antiquity cannot preſerve it from juſt cenſure, it being very irregular and confuſed, and frequently ambiguous, from making uſe of the ſame words in different ſenſes.

Malyne 108. 3 Burr. 1565.

The eſſentials in the contract of inſurance are: Firſt, the name of the perſon for whom the inſurance is made: Secondly, the names of the ſhip and maſter: Thirdly, whether they are ſhips, goods, or merchandizes, upon which the inſurance is made: Fourthly, the name of the place where the goods are laden, and whither they are bound: Fifthly, the time when the riſk begins, and when it ends: Sixthly, all the various perils and riſks which the inſurer takes upon himſelf: Seventhly, the conſideration, or premium, paid for the riſk or hazard run. Eighthly, the month, day, and year, on which the policy is executed: Ninthly, the ſtamp required by act of parliament. Of each of theſe in their order.

Firſt, of the name of the perſon inſured. It was formerly very much the practice to effect policies of inſurance, *in blank* as it was called, that is, without ſpecifying the names of the

(*a*) For the argument on both ſides of this queſtion ſee poſt ch. 12 of Illegal Voyages.

per

perſons, for whoſe uſe and benefit, or on whoſe account ſuch inſurances were made; a practice, which had been found in many reſpects to be miſchievous, and productive of great inconveniencies. Theſe evils were remedied at a very early period in *Genoa* and *France* by the marine ordinances of thoſe countries, which required the name of the perſon inſured to be inſerted in the policy, and whether he was to be conſidered in the capacity of principal or factor. In *England* a ſimilar regulation took place in the year 1774, with reſpect to inſurances upon lives; but it was not till the year 1785, that any proviſion was made for this evil in policies upon ſhips and merchandizes.

2 Magens 65. 169

14 Geo. 3. c. 48.

* P. 16

The ſtatute declares, "That from and after the fifth day of "*July*, 1785, it ſhall not be lawful for any perſon or perſons, "who reſide in *Great Britain*, to make, or cauſe to be made, "any policy or policies of inſurance upon his, her, or their "intereſt in any ſhip or ſhips, or any goods, merchandizes, "effects, or other property, without inſerting in ſuch policy or "policies, *his, her, or their own name or names*, as the perſon "intereſted therein, or the *name or names of the perſon or perſons*, "who ſhall effect the ſame, *as the agent or agents* of the perſon "or perſons ſo really intereſted therein, or for whoſe uſe or "benefit, or on whoſe account, ſuch policy or policies is or "are underwrote: and that it ſhall not be lawful for any per"ſon or perſons, who ſhall not live or reſide in *Great Britain*, "to make, or cauſe to be made, any policy or policies of aſ"ſurance upon his, her, or their intereſt in any ſhip or ſhips, "or on any goods, merchandizes, effects, or other property, "without inſerting in ſuch policy or policies the name or "names of the agent or agents of the perſon or perſons ſo "really intereſted therein, and for whoſe uſe or benefit, or on "whoſe account, the ſame is or are ſo made and underwrote: "and that every policy or policies of aſſurance, made or under"wrote contrary to the true intent and meaning hereof, ſhall be "null and void to all intents and purpoſes."

25 Geo 3. c. 44.

See Cox and an other, Executors v Parry. 1 TermRep. 464 in which it was held that the Executors could not recover, becauſe, amongſt other grounds, the name of their Teſtator was not inſerted in the policy

Upon the ſtatute juſt recited, a queſtion of ſome conſequence very ſoon aroſe, namely, Whether when the agent effects a policy for the principal reſiding abroad, it be neceſſary to inſert his name in the policy, *as agent*. Upon a debate, it was held, that if it be not ſtated, that he effected the policy, *as the agent* of the principal, the policy will be void within the ſtatute. Another queſtion alſo occurred in the ſame cauſe, Whether it was not the intention of the legiſlature, when the principal reſided abroad, that the agent ſhould live in *England*. It did not become neceſſary for the court to decide the latter queſtion; but the leaning of the judges clearly was in the affirmative. The caſe was thus:

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An action was brought upon a policy of insurance on a ship and its cargo from *Sunbury*, in *Georgia*, to *Amsterdam*; and it was agreed, that a verdict should be taken for the plaintiffs, and that the defendant's counsel should have the liberty of moving the court to set it aside, and enter a verdict for the defendant, (without costs) if, upon the construction of the 25th of *George* the Third, chap. 44. the court should be of opinion, that the plaintiffs were not intitled to recover. At the trial before Mr. Justice *Buller* it appeared, that the plaintiffs lived in *Georgia*, and had formerly been owners of the vessel, but, before *May* 1785, had transferred their property in her to one *Pierce*, who resided in the same country. The names of the plaintiffs were at the head of the policy, which was underwritten by the defendant in *September*, 1785; and the declaration stated, that they made it for the benefit of *Pierce*, in whom the interest was averred to be. Upon these facts the two questions arose: First, Whether when an agent effects a policy for his principal residing abroad, the statute requires that such agent's name should be inserted, *eo nomine*, as agent? Secondly, Whether, under the same act, it be necessary that the agent should live in *England* when the principal was abroad.

* P. 17 Pray and Others vers. Edie, 1 Term Rep. p. 313. for Trinity, 26 Geo. 3.

Lord *Mansfield*,—Whatever doubts I may have in my own mind with respect to the policy and expedience of this law, yet as long as it continues in force, I am bound to see it executed according to its meaning; and however I may think that this is not a commendable defence in the underwriter, yet that is a matter for his consideration, and not for mine. I have not a particle of doubt as to the true construction of this act. Let us consider what are the mischiefs intended to be remedied, and the provisions of the act for remedying them. The preamble recites, that great inconveniences had arisen, from omitting to insert in policies of insurance, the names of the persons for whose benefit, or on whose account, such policies were effected. That is the mischief: and it is remedied by enacting, that if *the principal resides in England*, his *own* name shall be inserted, or what amounts to the same thing, the name of his *agent*, *eo nomine*, *as agent for him*. If the agent were not to be named in the policy, in the capacity of *agent for the insured*, the public would still be left ignorant who the *insured was; and the principal intenion of the act would be defeated. Then as to the case of the insured *living abroad*, who *cannot insure in his own name*, there can be no doubt but that the name of his agent must be inserted, *eo nomine*, *as agent*. I am also strongly inclined to think, that the other objection, with regard to the residence of the agent, is good; but it is not necessary to give a direct opinion on that point.

* P. 18

Mr.

Mr. Juſtice *Buller*.—It ſeems to me to have been the intention of the legiſlature, that the name of the agent, who effects the policy for his principal reſiding abroad, ſhould be inſerted in the policy, *quaſt agent for ſuch perſon*. For the word "agent," in the ſecond clauſe, is to be underſtood in the ſame ſenſe as it is taken in the firſt: and I have as little doubt that the meaning of the act is, that ſuch agent ſhould reſide in *Great Britain*.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhurſt* were of the ſame opinion: and the rule was made abſolute.

If there are more perſons intereſted than one, it is abſolutely neceſſary that the names of all ſhould be inſerted, otherwiſe the policy is void: Nor will any other deſcription anſwer the deſign of the ſtatute. Thus in a late caſe, where there were ſeveral plaintiffs, the policy was made "*In the name of Mr. William Wilton and the reſt of the owners*," Mr. Juſtice *Buller* held the policy was void under the ſtatute.

Wilton and others v. Reaſton, B. R. at Guildhall ſittings after Michaelmas, 1787.

The deciſions which have been made upon this ſtatute have now become very immaterial; and are only preſerved to ſhew the complete hiſtory of that branch of the law, which we are diſcuſſing: for ſuch miſchiefs and inconveniences were found to ariſe to perſons intereſted in ſhips or veſſels from that act of parliament; that by a ſubſequent ſtatute, it was wholly repealed. But it was not deemed expedient again to allow of policies in Blank; and therefore the ſame ſtatute declared, "That it ſhould not be lawful, from and after the paſſing of "that act, for any perſon or perſons, to make or effect, or "cauſe to be made or effected, any policy of aſſurance on any "ſhip or veſſel, or upon any goods, merchandizes, effects, or "other property whatſoever, without firſt inſerting, or cauſing "to be inſerted in ſuch policy, the name or names, or the "uſual ſtile and firm of dealing of one or more of the perſons "* intereſted in ſuch aſſurance; or without, inſtead thereof, "firſt inſerting the name or names of the uſual ſtile and firm "of dealing, of the conſignor or conſignors, conſignee or "conſignees of the goods, or property ſo to be inſured; or "the name or names, or the uſual ſtile and firm of dealing of "the perſon or perſons reſiding in *Great Britain*, who ſhall "receive the order for and effect ſuch policy, or of the perſon "or perſons who ſhall give the order or directions to the agent "or agents immediately employed to negociate or effect ſuch "policy. The ſtatute further declares that every policy made "or underwrote contrary to the true intent and meaning of "this act, ſhall be null and void to all intents and purpoſes."

28 Geo. 3, ch. 56.

* P.

Previous to the paſſing of either of theſe acts it was held, that the huſband of a ſhip has no right to inſure for any part-owner, without his particular direction; nor for all the

French v. Backhouſe, 5 Burr. 2727.

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owners in general, without their general direction, or ſome thing equivalent to it.

Secondly, of the names of the ſhip and maſter. I do not find any expreſs regulation of this matter in *England*; but it ſeems to be neceſſary, by the law and uſage of merchants, to inſert the names of the ſhip and maſter, in order to fix with preciſion the bottom upon which the adventure is to be made, and the captain, by whoſe direction the ſhip is to be navigated, becauſe according to the degree of ſtrength and ſufficiency of the one, and the ſkill, ability, and knowledge of the other, the riſk is encreaſed or diminiſhed; and ſo alſo probably will the amount of the premium be regulated. The uſage of the merchants of *England* in this reſpect is agreeable to the expreſs laws and regulations of other maritime ſtates upon this point. Sometimes, however, there are inſurances generally "*upon any ſhip or ſhips*" expected from a particular place: and although it is more accurate to inſert the name of the captain, I would not to be underſtood to aſſert, as no deciſion has been made, that if a different captain came in the ſhip from that whoſe name is mentioned in the policy, it would therefore be void; eſpecially as the policy always contains the words "or "whoſoever elſe ſhall go for maſter in the ſaid ſhip."

Ord. of Lew. 14 tit. Inſurance, art. 3. Ord. of Amſterdam, ſ. 2.

* P. 20

* It has indeed been held that the owners of goods inſured, by the act of ſhifting the goods from one ſhip to another, do not preclude themſelves from recovering an average loſs ariſing from the capture of the ſecond ſhip, if they acted from neceſſity, and for the benefit of all concerned.

Plantamour v. Staples. 1 Term R. 611. note *(a)* upon a caſe reſerved.

Thirdly, whether they are ſhips, goods, or merchandizes, upon which the inſurance is made, is a fact which muſt be ſtated. It is abſolutely neceſſary that there ſhould be a ſpecification upon which of theſe the underwriter inſures; becauſe otherwiſe it would be impoſſible to know, whether, in any inſtance, he is liable or not to the loſs ſuſtained. But it is another queſtion, whether, in policies upon goods, it be neceſſary to declare the particulars. The practice, I believe, is very unſettled. It is the opinion, however, of a very reſpectable merchant, that the particulars of goods ſhould be ſpecified, if poſſible, by their marks, numbers, and packages, rather than that they ſhould be included under the general denomination of merchandize; or that if it be agreed to inſert them, when known to the inſured, care ſhould be taken not to omit it, as ſuch ſpecification prevents much trouble in proving to the inſurer the particular goods inſured, which are, more or leſs, ſubject to damage. But this mode of particularizing property is only adviſeable to be done, or, indeed, can only be done, when the riſk commences at home; becauſe, when goods are coming from abroad, it is better to inſure under general expreſſions, on account of the various caſualties, which may happen to obſtruct the purchaſe

1 Magens 8.

chaſe of the commodities intended to be ſent. It may be proper here to mention, that there are certain kinds of merchandize, which are of a periſhable nature, and liable to early corruption; on account of which, the underwriters of *London* have inſerted a memorandum at the foot of their policy, by which they declare, that in inſurances upon corn, fiſh, ſalt, fruit, flour, and ſeed, they will not be anſwerable for any partial loſs, but only for general averages, except the ſhip be ſtranded. That in inſurances on ſugar, tobacco, hemp, flax, hides, and ſkins, they conſider themſelves free from partial loſſes, not amounting *to five per cent.* and that on all other goods, as well as on the ſhip and freight, if the partial loſs be under *three pounds per cent.* unleſs it ariſe from a general ave-*rage or the ſtranding of the ſhip, they alſo conſider themſelves .diſcharged.

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Vide the Append. No. I

* P. 21,

This clauſe was introduced in the year 1749, in order to prevent the underwriters from being harraſſed by trifling demands, which muſt neceſſarily have ariſen upon every inſurance of this kind, on account of the periſhable nature of the cargo. The form of this memorandum was univerſally uſed, as well by the two inſurance companies, as by private underwriters, till the year 1754, when Lord Chief Juſtice *Ryder* ruled, and a ſpecial jury, agreeably to his direction, decided, that a ſhip, having run a-ground, was a ſtranded ſhip within the meaning of the memorandum; and that although ſhe got off again, the underwriter was liable to an *average or partial loſs* upon damaged corn. This deciſion induced the two companies to alter the memorandum, by ſtriking out the words, "*or the ſhip* "*be ſtranded*;" ſo that now they conſider themſelves liable to no loſſes, which can happen to ſuch commodities, except general averages and total loſſes: But the old form is ſtill retained by the private inſurers.

Per Buller Juſtice in Cocking. v. Fraſer. B. R. Haſt. 25 Geo. 3. vide Poſt.

Cantillony. Lond. Aſſur Comp. mentioned. 3 Burr 1553.

What ſhall be conſidered as loſſes within the meaning of this memorandum, will be the ſubject of future inveſtigation; my deſign at preſent being only to enumerate the eſſentials of a policy, and the reaſon and origin of them, as far as I have been able to trace them.

There are, however, ſome kinds of property, which do not fall under the general denomination of goods in a policy; and for the loſs of which the underwriters are not anſwerable, unleſs they are ſpecifically named.

An action was brought upon a policy of inſurance of the captain's goods for ſix months certain. The loſs proved was chiefly for goods laſhed on deck, and the captain's cloaths, and the ſhip's proviſions. It was proved by an underwriter and a broker, that none of thoſe things are within a general policy on goods; for the riſk was greater as to goods laſhed on deck, than other goods and a policy on goods means

Roſs v. Towaite. Sit. after Hil. 16 Geo. 3. at Guildh.

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only ſuch goods as are merchantable, and a part of the cargo. They alſo ſwore, that when goods like the preſent are meant * to be inſured, they are always inſured by name; and the premium is greater.

* P. 22.

Lord *Mansfield* ſaid, he thought it conſiſted with reaſon and underſtood the uſage to be ſo: therefore he adviſed the plaintiff to withdraw a juror, the premium having been paid into court, to which he conſented.

Fourthly, the name of the place at which the goods are laden, and to which they are bound.

This has been always held to be neceſſary in policies, at leaſt for upwards of two hundred years; and muſt be ſo, on account of the evident uncertainty which would follow from a contrary practice, as the inſurer would never know what the riſk was. which he had undertaken to inſure.

Molloy, b. 2. c. 7. ſ. 14

Molloy has laid down this doctrine, that if a ſhip be inſured from *London* to , a blank being left by the lader of the goods to prevent a ſurprize by an enemy, and if in her voyage ſhe happen to be caſt away, though there be private inſtructions for her port, yet the inſured muſt ſit down with his loſs, by reaſon of the uncertainty. In ſupport of his opinion, he cites the caſe of Monſieur *Gourdan*, governor of *Calais*, which was decided by commiſſioners of aſſurance at *Rouen* againſt the aſſured, becauſe, although the bills of lading truly declared the quantity and quality of the goods, the port of the ſhip's diſcharge was left a blank, on account of the war, which was then exiſting. Such alſo is now the law and uſage of merchants.

It is alſo cuſtomary to ſtate in the policy at what port or places the ſhip may touch and ſtay during the voyage, ſo that it ſhall not be conſidered as a deviation to go to any of thoſe places.

Ord. of Antwerp, Amſterdam, France, Spain and Copenhagen.

Fifthly, The time when the riſk commences, and when it ends. In moſt of the commercial countries abroad, it is particularly expreſſed, either in their ordinances or policies, and ſometimes in both. that the riſk of the inſurers ſhall commence, the moment the goods quit the ſhore, and ſhall continue till they are landed at the place of their deſtination: and that the * inſurer not only runs the riſk in the ſhip named in the policy, but alſo in all the boats or lighters, that ſhall be employed in carrying the goods aboard, and alſo in fetching them aſhore.

P. 23.

Vide Appendix, No. 1.

But the cuſtom of this country is very different, for the *Engliſh* policies expreſsly declare, that "the adventure ſhall begin upon the ſaid goods and merchandizes *from the loading thereof on board the ſaid ſhip*, and ſo ſhall continue until the ſaid ſhip, goods, and merchandizes ſhall be arrived at L. and upon the ſaid ſhip until ſhe hath moored at anchor 24 hours in good ſafety; and *upon the goods till the ſame be there ſafely diſcharged*

As to the continuance of the riſk *upon the ſhip*, ſee c. 2. page 31.

" *and*

" *and landed.*" From theſe words, it is obvious, that inſurers are not anſwerable for any accidents, which may happen to the goods in lighters or boats going aboard, *previous* to the voyage: yet as the policy ſays, the riſk ſhall continue *till the goods are ſafely landed*, it ſeems no leſs obvious, that where ſhips cannot come cloſe to the quay in order to unload, the inſurer continues reſponſible for the riſk to be run in carrying the goods in boats to the ſhore. If there be a loſs, however, in theſe caſes, the accident muſt have happened, while the goods were in the boats or lighters belonging to the ſhip: for then it is conſidered as a continuance of the ſame ſhip and voyage. But in a caſe where the owner of the goods brought down his own lighter, received the goods out of the ſhip, and before they reached land, an accident happened, whereby the goods were damaged, a ſpecial jury of merchants, under the expreſs direction of Lord Chief juſtice *Lee*, found that the inſurer was diſcharged, although the inſurance was upon goods to *London* and *till the ſame ſhould be ſafely landed there*.

Sparrow v. Carruthers 2 Stra. 1236.

By the ordinances laſt referred to, the number of days, in which people are obliged to unload their goods, is ſtipulated; but in *England* no expreſs time is fixed, the owners being left to their own diſcretion, provided there is no unreaſonable delay, which muſt always depend upon circumſtances.

The riſk on the body of a ſhip, according to the form of the policy received in practice, is to commence in general, " from *her beginning to load at* and ſo ſhall con- " tinue and endure *until the ſaid ſhip ſhall arrive at* " and hath there been moored at anchor twenty four hours in * " good ſafety. But this mode of ſtating the commencement of the riſk muſt commonly be applied only to inſurances on ſhips outward bound; for when inſurance is made on the homeward riſk, the beginning of the adventure is ſometimes ſtated to be " immediately from and after her arrival at the port abroad;" at other times, " from the departure;" and in ſhort, it is ſo variable, that nothing certain can be ſaid upon the point, depending, as it always has, and always muſt, upon the inclinations of the inſured.

1 Magen 47.

* P. 24.

Sixthly. Of the various perils and riſks, againſt which the underwriter inſures. Theſe muſt always be inſerted in all policies, and indeed the words now uſed are ſo comprehenſive, that in the opinion of *Molloy*, all thoſe curious queſtions, which occaſioned much debate and controverſy among the lawyers of former days, are now finally ſettled. Be this as it may, it is certain, that there is hardly any event which the imagination can form, as likely, in the common courſe of things, to happen to any ſhip, that is not amply provided for by the policies now uſed by underwriters. They undertake to bear " all perils of " the ſeas, men of war, fire, enemies, pirates, rovers, thieves,

Book 2 c. 7. ſ. 7.

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" jettiſons, letters of mart, and counter-mart, ſurpriſals, takings " at ſea, arreſts, reſtraints and detainments of all kings, princes, " and people, of what nation, condition, or quality ſoever; bar- " ratry of the maſter and mariners, and all others perils, loſſes " and misfortunes, that have or ſhall come to the hurt, detriment, " or damage of the ſaid goods and merchandizes, and ſhip, or " any part thereof." But although the words, deſcriptive of the hazards run by the inſurers, be ſo very large and comprehenſive, it ſhould ſeem that a great difference is to be made between the damage ſuſtained by goods *on board* a ſhip, and that which occurs by external accidents; that the inſurer is liable in the latter caſe cannot admit of a doubt, but as the former may proceed from the bad ſtowage of the goods, or from their being expoſed to wet; and as they are neglects attributable to the maſter; the ſhip and not the inſurer ought to be anſwerable. Upon this point, however, I find no caſe in the reports, and therefore I ſtart it rather as a doubt in my own mind, than as preſuming to hint at an opinion. In *Malyne* it is ſaid, that if there be thieves on ſhip board among themſelves, the maſter * of the ſhip is to anſwer for that, and to make it good, ſo that the inſurers are not to be charged with any ſuch loſs, for he ſuppoſes, the word "thieves" to mean *aſſailing thieves* only, for ſo he terms them. It is certain, that a modern ſtatute gives ſome countenance to this idea, by the preamble to which it appears, that previous to the period of paſſing that act, the owners of the ſhip were liable to the proprietors of the goods for any embezzlement, ſecreting, or making away with, of the goods, by the maſter or the mariners, or with their privity, to whatever amount the value might be: by that ſtatute however, the meaſure of the reſponſibility is to be the value of the ſhip and freight. To be ſure, it is not a neceſſary conſequence, that becauſe the owner is liable in ſuch a caſe, therefore the inſurer, if an inſurance has been made, muſt be diſcharged. *Roccus*, however, is of opinion, that when a theft is committed *on board* the ſhip, and ſome goods have been ſtolen, then the inſurers are not bound, becauſe the owner of the goods, as much as in him lies, is obliged to take care of them; and if they are ſtolen, while in the veſſel, this cannot be called an *accident*, but has happened through the *negligence* of thoſe, who did not take proper care of them. He adds, that the maſter or owners being liable is an additional reaſon for this regulation, becauſe the maſter of the ſhip is held anſwerable for thefts committed therein, as by receiving the goods on board, he enters into a tacit agreement to deliver them ſafe and whole. It was thought proper thus to ſtate the opinion of this learned writer upon the ſubject, on account of the total ſilence of the law of *England* in this reſpect.

1 Magens 50.

Malyne c 25. Lex. Merc. Reſ. 4th edit. p. 295.

* P. 25.

7 Geo. 2. c. 15.

Roccus de aſſecurationibus, Not. 42.

But

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But that the underwriter is liable for a robbery of the goods insured, when committed by thieves from without, cannot be doubted; as thieves are a peril expresly insured by the policy.

In addition to the various risks above enumerated, which the underwriters take upon themselves, it is frequently the practice, to insure her *lost or not lost*, which is certainly very hazardous; because if the ship should be lost, at the time of the insurance, still the underwriter, provided there be no fraud, is liable. The premium is, however, great in proportion, depending upon the circumstances stated to shew the probability or improbability of the ship's safety. These words "*lost or not lost*," are peculiar to *English* policies, not being inserted in the policies of foreign nations.

Harford v. Maynard, bef. Lord Mansfield at Guildhall. Hil. Vac. 1785. Molloy, b. 2. c. 7. s. 5.

Roccus Not. 51. 5 Burr. 2803.

* Seventhly. The consideration or premium for the risk or hazard run: this is the most material part of the policy, because it is the consideration of the premium received, that makes the underwriter liable to the losses that may happen. In *English* policies it is always expressed to have been received at the time of underwriting; "we the assurers confessing ourselves paid the "consideration due unto us for this assurance by the assured." This being subscribed by the underwriter, it is proper to enquire whether, if the premium were not actually paid at the time, he could afterwards maintain an action for it against the *assured*, who might then produce his subscription as evidence against himself. One old case has been found upon the subject, but that is by no means satisfactory. It was an action of assumpsit, and the plaintiff declared that the defendant was indebted to him in twenty pounds, for a premium upon a policy of assurance on such a ship. The defendant demurred *specially*, because the plaintiff did not shew the considerations certainly, what the premium was, or how it became due: but the objection was not allowed, for this is as good as an *indebitatus pro quodam salario*, which has been adjudged good. Here, however, is no decision upon the merits, nor does it appear, whether the defendant was the broker or the insured himself. It is true, in practice, policies in general are effected by the intervention of a broker; and by the usage of trade, open accounts are kept between the insurers and brokers, in which case, the underwriter may have an action against the broker for premiums received to his use. In one case, indeed, the question did arise, though nothing was done upon it.

* P. 26.

Fowk v. Pinsacke. 2 Lev. 153.

It was an action by the insurer against the owners, who in this case acted, without the intervention of a broker, for money had and received to his use. The case was decided upon other grounds, for which it will be mentioned more at length hereafter; but just before the verdict was given, it was objected, that this action would not lie for premiums against the *insured themselves*. Lord *Mansfield*, however, thought the objection

Gist v. Mason, Mich. Vac. 1785, at Guildhall

CHAP. I

came too late, and would not, at that ſtage of the cauſe, when the jury were ready to give their verdict, enter into it.

In an action brought by the aſſignees of a broker againſt the aſſured, for premiums paid by the bankrupt to the underwriters, * P. 27 * the queſtion came collaterally before the court: but I do not find that any point was reſerved, and the verdict was general. However, upon all the caſes it ſeems that the broker alone is the debtor to the underwriter.

Airy and others Aſſignees of Milton v. Bland, Trin. Sitt. at Guildhall, 14 Geo. 3.

It was an action brought by the plaintiffs, as aſſignees of *Milton*, who was a broker at *Newcaſtle*, and who had procured an inſurance to be effected by different perſons for the defendant. The declaration ſtated, that in conſideration that the bankrupt would procure an inſurance to be made on the ſhip *Jaſon*, and would procure ſix hundred pounds to be inſured thereon by goods and ſufficient perſons, the defendant promiſed that he would pay the bankrupt the premiums, and a reaſonable ſum for his trouble. The firſt queſtion was, whether credit was given by the underwriters to the aſſured or to the broker, where the premium was not paid down at the time the aſſurance was made. *Milton*, the bankrupt, ſwore, that in *May*, 1764, he was told by the underwriters that they ſhould look upon him as their debtor, and that they would have nothing to do with the inſured, which was conſidered at *Newcaſtle*, as the *London* practice: that from that time he had always acted on this plan, and had paid ſince that time one thouſand pounds to underwriters, which he had never received. His commiſſion was five *per cent*. *London* inſurance brokers were then called, who ſaid, they underſtood the underwriters looked to them only; and that the underwriters did not once in ten times know who the inſured were: and that in caſe of failure, the underwriter came upon the effects of the broker; the broker upon thoſe of the inſured.

Lord *Mansfield* ſaid,—The plaintiff's caſe is ſtronger than referring to the general uſage in *London*; for they act by a ſpecifick rule, which they ſuppoſed to be the rule in *London*: and if the uſage in *London* were doubtful, ſtill the plaintiffs would be entitled to recover. There was a verdict for the plaintiffs.

1 Mag. 84.

Eighthly. The day, month, and year, on which the policy is executed. This inſertion ſeems very neceſſary, becauſe by comparing the date of the policy with the date of facts which happen afterwards, or are material to be proved, it will fre- * P. 28. * quently appear, whether there is any reaſon to ſuſpect fraud or improper conduct, on the part of the inſured.

The ninth and laſt requiſite of a policy of inſurance is, that it duly ſtamped.

11 Geo. 1. c. 30. ſ. 44.

It is enacted, that when any ſhip, goods, or merchandizes ſhall be inſured, a policy duly ſtamped ſhall be iſſued within three

three days at fartheſt, on the forfeiture of one hundred pounds, to be paid by the inſurers for every ſuch offence, and all promiſſory notes for inſurances ſhall be void.

By a ſubſequent ſtatute, is was declared, that if the properties of more than one perſon in any ſhip, cargo, or both, or of more than a particular number of perſons in general partnerſhip, or of more than one body politick or corporate, to a greater amount than one hundred pounds be inſured in one policy, ſuch policy ſhall be void, and the premium ſhall remain with the inſurer: and if any adventure, diſtinct from that mentioned in the original policy, and upon which any further premium ſhall be given, ſhall be by any writing not duly ſtamped, added to the ſaid original policy, ſuch additional aſſurance ſhall be void, and the underwriters ſhall retain the premium. Provided that the property of any number of perſons may be inſured in one policy, ſtamped with five ſtamps at five ſhillings each. 19 Geo. 3. c. 46. ſ. 3, 4.

This ſtatute, however, having proved inconvenient to merchants reſiding out of the kingdom; by another ſtatute, it was ordained, that policies for any *number* of perſons, and to any amount not exceeding one thouſand pounds, on ſhip, or cargo, or both, might be inſured upon a ſtamp of five ſhillings, and to any higher amount upon a ſtamp of ten ſhillings. This ſtatute alſo contains a clauſe, which makes additional aſſurances to the original policy, not being duly ſtamped, void. 7 Geo. 3. c. 44 ſ. 1, 2

A doubt having ariſen, whether the inſurance upon the property of a ſingle perſon required more than a five ſhillings ſtamp, whatever the amount might be, it was enacted, that, wherever property, amounting to upwards of one thouſand pounds, is inſured, there muſt be two ſtamps of five ſhillings each. And if any perſon be ſued for inſuring upwards of one thouſand pounds on a five ſhilling ſtamp, the *onus probandi* ſhall lie upon him. 8 Geo. 3. c. 25. ſ. 4. & 5.

There is ſtill another act of parliament, which has declared, that upon every ſkin or piece of vellum or parchment, or ſheet of paper, on which any policy of inſurance ſhall be written, whereby the property of one or more perſons in houſes or goods, or both ſhall be inſured to a greater amount in the whole than one thouſand pounds, over and above the ſeveral duties already impoſed, there ſhall be an additional duty of five ſhillings: this ſtatute ſeems only to relate to inſurances againſt fire. 17 Geo. 3 c. 50. ſ. 17

From a review of the ſeveral ſtatutes upon this ſubject, the law ſeems to require that for every policy of inſurance, not exceeding one thouſand pounds, a ſix ſhilling ſtamp ſhall be neceſſary; and above that ſum. a ſtamp of eleven ſhillings. 5 W. & M. c. 21 ſ. 3. 9 & 10 W. 3. c. 25. ſ. 37. 12. Anneſt 2. c 9 ſ. 21.

10 Anne c, 26. ſ. 67. 30 Geo. 2. c. 19. ſ. 1. 5. G 10. 3. c. 35. ſ. 4. 16 Geo. 3. c. 34. ſ 5.

By

CHAP. II.

By the ordinances of *France*, and other maritime countries, all policies of inſurance muſt be regiſtered; but no ſuch regulation prevails in *England*, either by the law, or in practice.

2 Ord. of France Article 69 of Aſſurance.

* P. 30.

*CHAPTER THE SECOND.

Of the Conſtruction of the Policy.

A POLICY of inſurance, being a contract of indemnity, and being only conſidered as a ſimple contract, muſt always be conſtrued, as nearly as poſſible, according to the intention of the contracting parties; and not according to the ſtrict and literal meaning of the words. The mercantile law, in this reſpect, is the ſame in every part of the world; for from the ſame premiſes, the ſound concluſions of reaſon and juſtice muſt ever be the ſame. Thus, as the benefit of the inſured, and the advancement of trade, are the great objects of inſurance, policies are to be conſtrued largely, in order to attain thoſe ends: for it would be abſurd to ſuppoſe, that when the *end* is inſured, the ordinary and uſual means of attaining it can poſſibly be excluded; whatever, therefore, is done by the maſter of the ſhip, in the uſual courſe, neceſſarily, *et ex juſtâ cauſâ*, although a loſs happen thereon, the underwriter ſhall be anſwerable.

1 Burr. 347. Rocc. Not. 18.

1 Burr. 343.

But in the conſtruction of policies, no rule has been more frequently followed than the *uſage* of trade, with reſpect to the particular voyages or riſks, to which the policy relates; and in the caſes about to be quoted in ſupport of theſe principles, it will be found, that the learned judges have always called in the uſage of trade, as the ground, upon which the conſtruction turns.

In ſtating the different caſes upon this ſubject, as the point is nearly the ſame in all, the order of time, in which they were determined, is that which will be purſued, in order to prevent confuſion.

Anonym. 1 Salk. 443.

The firſt to be mentioned is an anonymous caſe in the time of *James* the Second; but it is from a reporter of very good authority. A policy of inſurance ſhall be conſtrued to run until the ſhip ſhall have ended, and be diſcharged of her voyage; * P. 31. * for arrival at the port, to which ſhe was bound, is not a diſcharge *till ſhe is unloaded*: and it was ſo adjudged by the whole court, upon a demurrer.

But although this conſtruction may be perfectly right, where the policy is general from *A.* to *B.* yet if it contain the words uſually inſerted "*and till the ſhip ſhall have moored at anchor*

'twenty

" *twenty-four hours in good ſafety*" the underwriter is not liable for any loſs, ariſing from ſeizure after ſhe has been twenty-four hours in port; though ſuch ſeizure was in conſequence of an act of barratry of the maſter *during the voyage*, for, if it were extended beyond the time limited in the policy, it would be impoſſible to lay down any fixed rule, and all would be uncertainty and confuſion.

Lockyer and Others v. Offley, 1 Term Reports, p. 252. for Eaſter 26. Geo. 3.

This was decided in an action on a policy of inſurance on the ſhip *Hope* from *Hamburgh*, to *London*, ſubſcribed by the defendant for two hundred pounds at one guinea *per cent*. At the trial before Mr. Juſtice *Buller*, at *Guildhall*, a verdict was found for the plaintiffs, ſubject to the opinion of the court, upon the following caſe: that the plaintiffs were intereſted in the ſhip to the amount of the ſum inſured. That in the courſe of the voyage, the maſter committed barratry by ſmuggling on his own account, by hovering and running brandy on ſhore in caſks under ſixty gallons. That on the firſt of *September* 1785, *the ſhip arrived in ſafety at her moorings in the river Thames, and remained there in ſafety till the twenty-ſeventh of the ſaid month of September*, when ſhe was ſeized by the revenue officers for the ſmuggling before ſtated. That about three weeks after the ſeizure, the plaintiff informed the underwriters thereof; and that they would hold them liable on the policy. That on the twentieth of *October*, the plaintiffs preſented a petition to the commiſſioners of his majeſty's cuſtoms, in which they imputed all the blame (which was certainly the truth) to the captain, and praying that their veſſel might be reſtored, on paying ſomething to the ſeizing officer. The anſwer was, " that the proſecution muſt proceed, as the ſhip had been guilty of a groſs " violation of the laws, but that the owners ſhould be at liberty " to compound, according to the rules of the Exchequer." That the ſhip was appraiſed at the ſum of three hundred and forty five pounds, and by the courſe of the court of Exche- * P. 32
* quer, the ſhip would have been reſtored to the plaintiffs, upon the payment of two hundred and thirty pounds, beſides coſts and charges, which would altogether have amounted to three hundred and twenty-nine pounds, nine ſhillings and ſeven pence. That in *November*, a notice was indorſed on the policy, binding the underwriters for all coſts and charges expended about the recovery of the ſhip. That this was ſhewn to the underwriters, who refuſed to ſubſcribe it.

This caſe was fully argued, in the abſence of Lord *Manſfield*, and the court having taken time to deliberate, Mr. Juſtice *Willes* pronounced their unanimous opinion. " There is no " doubt in this caſe, but that the maſter was guilty of barratry, " by ſmuggling on his own account, without the privity of his " owners. Many definitions of barratry are to be found in the " books, but perhaps this general one may comprehend almoſt all

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" all the caſes: barratry is every ſpecies of fraud or knavery " in the maſter of the ſhip, by which the freighters or owners " are *injured*; and in this light a criminal or wilful deviation " is barratry, if it be without their conſent. The general " queſtion here is, whether, as the loſs, which was occaſioned " by the barratry of the maſter, did not happen *during the* " *continuance of the voyage*, the inſurers are liable. I muſt own " this appears to me to be a novel queſtion, and not to have " been decided by any former determinations. Difficulties " occur on both ſides in laying down any rule. The firſt " thing to be obſerved is, that the policy, by the terms of it, " is an undertaking *for a limited time*, during the voyage from " *Hamburgh* to *London*, *till the ſhip has moored twenty-four* " *hours in ſafety*; and the ſhip was not actually ſeized till near " a month afterwards. But it has been ſaid that under the 24th " of *George* the Third, chap. 47. and the exciſe laws, the for- " feiture attaches the moment the act is done, and that the bar- " ratry was committed *during the voyage*. It may be ſo as to " ſome purpoſes, as to prevent intermediate alterations or in- " cumbrances; but I think the *actual* property is not altered, " *till after the ſeizure*, though it may be before condemnation. " I will put this caſe; ſuppoſe, before the ſeizure of the ſhip, " ſhe had gone another voyage, and on her return had been " ſeized, would the crown be entitled to an account of her " * earnings, after deducting the expences of the outfit? ſurely " not. Till the ſeizure, it was not certain that the officers of " the crown knew of the illicit trade carried on by the maſter, " or whether they would take advantage of the forfeiture. It " would be a dangerous doctrine to lay down, that the inſurer " ſhould, in all caſes, be liable to remote conſequential da- " mages. This has been compared to a death's wound re- " ceived during the voyage, which ſubjected the ſhip to a " ſubſequent loſs. To this point the caſe of *Meretony* v. " *Dunlop*, ſeems very material. That was an inſurance on a " ſhip, for ſix months; and three days before the expiration " of the time, ſhe received her death's wound, but by pump- " ing, was kept afloat, till three days after the time: there " the verdict, under the direction of Lord *Mansfield*, was " given for the inſurer; and it was afterwards confirmed by " the court. I will put another caſe: ſuppoſe an inſurance " upon a man's life for a year, and ſome ſhort time before the " expiration of the term, he receives a mortal wound, of " which he dies after the year, the inſurer would not be liable " The caſe of *Vallejo* v. *Wheeler* was cited for the plaintiff, " but that does not conclude this queſtion, for there the ſhip " was loſt, *during the voyage*. It was alſo argued, that the " ſhip, even in the hands of a fair purchaſer, would be liable " to the forfeiture. I do not know that it ever has been ſo " decided;

* P. 33

Eaſter 23 Geo. 3. B. R.

Vide poſt c. 5.

" decided; it may depend on circumſtances, ſuch as length of " poſſeſſion, laches in ſeizing, or other matters. But ſuppoſe " the law to be ſo, it does not follow from thence, that though " the ſhip *is always liable to confiſcation*, that the inſurer at any " diſtance of time is anſwerable for the loſs under a limited " undertaking. And this brings me to that part of the caſe, " which weighs moſt with the court, in favour of the defen- " dant, and to which it does not appear to us, that any ſatis- " factory anſwer has been given. It was agreed in the argu- " ment, that the cuſtom-houſe officers might ſeize for the for- " feiture within three years after the fact committed; and that " the attorney-general might file an information, at any time " whilſt the ſhip was in being. Is the inſurer during all this " time to continue liable? Suppoſe the ſhip had gone ſeveral " voyages afterwards; and ſuppoſe a partial loſs paid, and the " * underwriter's name ſtruck off, ſhall an action be afterwards * P. 34. " brought upon the policy? His account could never be " ſettled, nor could he be finally diſcharged, whilſt the ſhip " was in exiſtence; ſuch a poſition would be monſtrous, and " attended with infinite inconvenience. There muſt be ſome " certain and reaſonable limitation in point of time laid down " by the court, when the inſurer ſhall be releaſed from his " engagement. If he be liable for a month, he may be for a " year, and ſo on. We all think that the law of inſurances " would be left unſettled, and in much confuſion, if any other " time were allowed, than that preſcribed by the policy, " namely, *the continuance of the voyage, and the ſhip's mooring* " *twenty four hours in ſafety.* Judgment for the defendant."

In an action upon a policy of inſurance by the defendant at *London*, inſuring a ſhip from thence to the *Eaſt Indies*, war- ranted to depart with convoy, the declaration ſhewed, that the ſhip went from *London* to the *Downs*, and from thence with convoy, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clauſe " warranted to depart with convoy" muſt be conſtrued according to the uſage among merchants, that is, from ſuch place where convoys are to be had, *as the Downs*. Lethulier's Caſe 2Salk. 443.

It is true, Lord Chief Juſtice *Holt* differed from the reſt of the court, being of opinion that it was no part of the law of merchants to take convoy in the *Downs*. His lordſhip's opi- on, however, although it is one of the firſt legal authorities, is certainly contradicted by practice, it being almoſt the inva- riable cuſtom for the convoy to meet the merchant ſhips only in the *Downs*. Bond v. Conſules, 2Salk. 445

Caſe upon a policy of inſurance, which was to inſure the *William* galley in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The caſe was, the galley

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ſet ſail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* * men of war and an Admiral. After a ſtay of nine weeks, they ſet ſail from the *Texel*; the galley was ſeparated in a ſtorm, taken by a *French* privateer, and re-taken by a *Dutch* privateer, and paid eighty pounds ſalvage. It was ruled by *Holt*, Chief Juſtice, that the voyages out to be according to *uſage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made) there was no convoy for ſhips directly from *Bremen* to *London*. Verdict for the plaintiff.

* P. 35.

Waples v. Eames, 2 Stra. 1243

The ſhip *Succeſs* was inſured "*at and from Leghorn to the* "*port of London, and till there moored twenty four hours in good* "*ſafety.*" She arrived the 8th of *July* at *Freſh Wharf* and moored, but was the ſame day ſerved with an order to go back to the *Hope* to perform a fourteen days quarantine. The men upon this deſerted her, and on the 12th of the month the captain applied to be excuſed going back, which petition was adjourned to the twenty-eighth, when the regency ordered her back; and on the thirtieth, ſhe went back, performed the quarantine, and then ſent up for orders to air the goods; but before ſhe returned, the ſhip was burned on the twenty third of *Auguſt*, and now the queſtion was, whether the inſurer was liable.

Lord Chief Juſtice *Lee* ruled, that though the ſhip was ſo long at her moorings, yet ſhe could not be ſaid to be there in *good ſafety*, which muſt mean the opportunity of unloading and diſcharging; whereas here ſhe was arreſted within the twenty-four hours, and the hands having deſerted, and the regency taken time to conſider the petition, there was no default in the maſter or owners: and it was proved that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plantiff.

In an inſurance upon *freight*, if an accident happens to the ſhip before any goods are put on board, which prevents her from ſailing, the inſured upon the policy cannot recover the freight which he would have earned, if ſhe had ſailed. The circumſtances of the caſe were theſe:

Ronge v. Watts, 2 Stra. 2151.

The plaintiff inſured *on ſhip and freight*, at and from *Jamaica* to *Briſtol*. A cargo was ready to put on board: but the ſhip being careening in order for the voyage, a ſudden tempeſt aroſe, and ſhe and many others were loſt. The rigging and part of her were recovered and ſold, and the defendant paid into court as much as, upon an average, he was liable to for the loſs of the ſhip: but the plaintiff inſiſted to be allowed ſix hundred pounds for the freight the ſhip *would have earned* in the voyage, if the accident had not happened. But as the goods

goods were not actually on board, ſo as to make the plaintiff's right to freight commence; Lord Chief Juſtice *Lee* held, he could not be allowed it, and he was nonſuited.

But if the policy be a valued policy, and part of the cargo be on board when ſuch accident happens, the reſt being ready to be ſhipped, the inſured may recover to the whole amount. This was ſo decided in an action brought by the aſſured on a policy on freight, valued at fifteen hundred pounds: In fact only five hundred pounds worth of freight was on board when the ſhip was driven from her moorings and loſt: but goods to the amount of the reſt of the freight were ready to be ſhipped, and were lying on the quay for that purpoſe at the time. Monteome-ry v. Eg-linton. 3 Term R. 362.

Lord *Kenyon* Chief Juſtice, before whom the cauſe was tried, told the jury, that the queſtion for their conſideration was, whether this was a mere colourable inſurance and a gaming policy, or whether it was a *bona fide* tranſaction: if the latter, the aſſured was entitled to recover for the whole value in the policy. The jury found the whole ſum. The defendant's counſel obtained a rule for a new trial, which he afterwards abandoned, the court being ſtrongly of opinion againſt him.

On an inſurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*, and the ſhip *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The inſurers reſiſted the demand of indemnity, alledging, that as there was a *French* war, the ſhip ſhould not have ventured through the *Channel*, but have waited for occaſional convoy. Lord Chief Juſtice *Lee*, however, was of opinion, that the ſhip was to be conſidered as under the defendant's inſurance to a place of general rendezvous, according to the interpretation of the words, *warranted to depart with convoy*. *Salk.* 443, 445. and if the parties meant * to vary the inſurance from what is *commonly* underſtood, they ſhould have ſtated it. Two ſpecial juries of merchants found their verdicts agreeably to that direction. Gordon v. Morely. Campbell v. Bordieu. 2 Stra. 1265. Vide ſupra. * P. 37.

This caſe has already been mentioned, on account of an alteration made in the policy after the time of underwriting; it ſhall now, however, be conſidered wholly independant of that circumſtance. It was a bill filed in the court of Chancery, which ſtated that the ſhip *Eyles*, late in the *Eaſt India* Company's ſervice, was, in the year 1732, at *Bengal*, at which time the owner employed *I. H.* to inſure the ſhip in the *London* Aſſurance Office for five hundred pounds. The adventure thereon was to commence *from her arrival at Fort Saint George*, and thence to continue till the ſaid ſhip ſhould arrive in *London*, and that it ſhould be lawful for the ſaid ſhip, in the ſaid voyage, to ſtay at any ports or places without prejudice, and that the ſhip Motteux and Others v. the Gov. and Comp. of London Aſſur. 1 Atk. 545.

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ſhip was, and ſhould be rated *at intereſt or no intereſt* without farther account: in conſideration whereof, *I. H.* paid fifteen pounds premium. *The Eyles* came to *Fort Saint George* in *February*, 1733, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ſhips, *&c.* ſhe ſailed to *Bengal* to be refitted, and after being ſheathed, in her return upon her homeward-bound voyage, ſhe ſtruck upon the *Engilee* ſands and was loſt. Evidence was read on the part of the plaintiffs to prove, that *Bengal* was the moſt proper place to refit, and that ſhe went thither for that reaſon; that this was a voyage of neceſſity and not a trading voyage, for ſhe took nothing on board, but water, proviſion and ballaſt.

Lord Chancellor *Hardwicke*—As to the queſtion, whether there has been a breach, or, in other terms, a loſs, within the meaning of this policy, the general principles laid down by the plaintiff's counſel are right, that ſtreſs of weather, and the danger of proceeding on a voyage, when a ſhip is in a decayed condition, are to be conſidered. In ſuch a caſe, if ſhe went to the neareſt place, I ſhould conſider it equally the ſame as if ſhe had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation.

* P. 38 * It is a very material circumſtance, that the governor ordered the lading to be taken, out, to ſhew the neceſſity of the ſhip's being repaired, but there is not a ſyllable of proof why ſhe might not have been equally well repaired at *Fort Saint George*. There is one part of this caſe which diſtinguiſhes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ſhip was loſt in *July*, 1733, three weeks before the time of making this policy, ſo that clearly the ſhip was not at *Fort Saint George* at the time the agreement was made; and therefore it is a material queſtion, whether it comes within the agreement. His Lordſhip directed an iſſue to try, whether the loſs in *July*, 1733, was a loſs during the voyage, and according to the adventure agreed upon; which iſſue was afterwards found for the plaintiffs upon a trial in the Common Pleas,

1 Atk. 548. In an action upon a policy of inſurance, before Lord Chief Juſtice *Hardwicke*, it has been held, that the words "at and "from *Bengal* to *England*," meant *the firſt arrival* at *Bengal*; and it was agreed, that when ſuch words are uſed in policies, *firſt arrival* is always implied and underſtood.

Chitty v. Selwin. 2. Atk. 359. It has likewiſe been held, that when a ſhip is inſured *at and from a place*, and it arrives at that place, as long as the ſhip is preparing for the voyage upon which it is inſured, the inſurer is liable: but if all thoughts of the voyage be laid aſide, and the ſhip lie there five, ſix, or ſeven years, with the owner's

owner's privity, it ſhall never be ſaid the inſurer is liable; for it would be to ſubject him to the whim and caprice of the owner,

This was an action on a policy of inſurance on a ſhip, at and from *Jamaica* to *London*. The ſhip had alſo been inſured from *London* to *Jamaica* generally, and was loſt in coaſting the iſland, after ſhe had touched for ſome days at one port there, but before ſhe had delivered all her outward-bound cargo at the other ports of the Iſland. This was an action on the homeward policy; and in order to ſhew when the homeward-bound riſk commenced, it was neceſſary to ſhew at what time the outward bound riſk determined; and the jury, which was ſpecial, after an examination of merchants as to * the cuſtom, by their verdict, decided, that the outward riſk ended, when the ſhip had moored in any port of the iſland, and did not continue till ſhe came to the laſt port of delivery.

Camden v. Cowley. 1 Black. 417.

* P. 39

In the *Trinity* term following, a motion was made for a new trial, but it was refuſed; becauſe it had been thoroughly tried and no new light could be thrown upon it, although Lord *Mansfield* ſaid, the inclination of his opinion at the trial was the contrary way. Mr. Juſtice *Wilmot* thought, the conſtruction put upon the policy by the Jury was the right one.

1 Black. 418.

In a ſimilar caſe, Lord *Mansfield* laid down the ſame doctrine to the jury, namely, that the outward riſk *upon the ſhip* ended twenty-four hours after its arrival in the firſt port of the iſland to which it was deſtined: but that the outward policy *upon goods* continued till they were landed.

Barraſs v. The Lond. Aſſurance. Sittings after Hilary 1782. at Guildhall.

But the great and leading caſes, upon queſtions of conſtruction, are two *Tiernay* v. *Etherington*, and *Polly* v. the *Royal Exchange* Aſſurance company; the former determined by Lord Chief Juſtice *Lee*, and the latter by Lord *Mansfield*. In theſe caſes, the principles, which are to be obſerved in the conſtruction of policies, are ſo fully conſidered, and the application of them to the particular circumſtances of the different caſes is made with ſo much accuracy and perſpicuity, that they are to be regarded as the pole ſtar to direct our enquiries upon all ſimilar occaſions.

The firſt of theſe cauſes, was an action upon a policy of inſurance "on goods, in a *Dutch* ſhip, from *Malaga* to *Gibraltar*, "and at and from thence to *England* and *Holland*, both or "either: on goods, as hereunder agreed, beginning the ad- "venture from the loading, and to continue till the ſhip and "goods be arrived at *England* or *Holland*, and there ſafely "landed." The agreement was, "that upon the arrival of "the ſhip at *Gibraltar*, the goods might be unloaded, and re "ſhipped in one or more *Britiſh* ſhip or ſhips for *England* and "*Holland*, and to return one *per cent.* if diſcharged in *Eng-*

Tiernay v. Etherington, before Lee Chief Juſtice 5 Marr. 1743 1 Bu. 348.

"*land.*"

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"*land.*" It appeared in evidence, that when the ſhip came to *Gibraltar*, the goods were unloaded, and put into a *ſtore ſhip*, (which it was proved was always conſidered as a warehouſe) * and that there was then no *Britiſh* ſhip there. Two days after the goods were put into the ſtore ſhip, they were loſt in a ſtorm. The queſtion was, whether this was a loſs, within the conſtruction of the policy.

* P. 40.

Lee, Chief Juſtice.—It is certain that in the conſtruction of policies, the *ſtrictum jus*, or *apex juris*, is not to be laid hold of: but they are to be conſtrued largely, for the benefit of trade, and for the inſured. Now it ſeems to be a ſtrict conſtruction, to confine this inſurance only to the unloading and reſhipping, and the accidents attending that act. The conſtruction ſhould be according to the courſe of trade in this place; and this appears to be the uſual mode of unloading and reſhipping in that place, *viz.* that when there is no *Britiſh* ſhip there, then the goods are kept in ſtore ſhips. Where there is an inſurance on goods on board ſuch a ſhip, that inſurance extends to the carrying the goods to ſhore in a boat. So if an inſurance be of goods to ſuch a city, and the goods are brought in ſafety to ſuch a port, though diſtant from the city, that is a compliance with the policy; if that be the uſual place to which the ſhips come. Therefore, as here is a liberty given of unloading and reſhipping, it muſt be taken to be an inſuring under ſuch methods as are proper for unloading and reſhipping. There is no neglect on the part of the inſured, for the goods were brought into port the nineteenth, and were loſt the twenty-ſecond of *November*. This manner of unloading and reſhipping is to be conſidered as the neceſſary means of attaining that, which was attended by the policy; and ſeems to be the ſame, as if it had happened in the act of unſhipping from one ſhip into another. And as this is the known courſe of the trade, it ſeems extraordinary, if it was not intended. This is not to be conſidered as a ſuſpenſion of the policy; for as the policy would extend to a loſs, happening in the unloading and reſhipping from one ſhip to another, ſo any means to attain that end come within the meaning of the policy. The plaintiff had a verdict.

Afterwards a new trial was moved for; but it was refuſed by *Lee*, Chief Juſtice, Mr. Juſtice *Chapple*, and Mr. Juſtice *Deniſon*, againſt the opinion of Mr. Juſtice *Wright*.

Eaſter Term 1743.

* P. 41.

* The next of theſe cauſes came before the court upon a caſe reſerved for their opinion, after a trial and verdict for the plaintiff, at *Guildhall*, before Lord *Manſfield*. It was an action of covenant upon a policy of inſurance.

Pelly v. The Governor and Comp. of the Royal Exch. Aſſur. 1. Burr. 341.

The caſe ſtates, that the plaintiff, being part owner of the ſhip *Onſlow*, an *Eaſt India* ſhip, then lying in the *Thames*, and bound on a voyage to *China*, and back again to *London*, inſured it

it "at and from *London*, to any ports or places beyond the "*Cape of Good Hope*, and back to *London*, free from average "under ten *per cent.* upon the body, tackle, apparel, ordnance, "munition, artillery, boat, and other furniture of, and in the ſaid "ſhip: beginning the adventure upon the ſaid ſhip from and "immediately following the date of the policy, and ſo to con-"tinue and endure until the ſhip ſhall be arrived as above, and "there anchored twenty-four hours in good ſafety." The perils mentioned in the policy were the common perils, *viz.* "of the ſeas, men of war, fire, *&c.*" The ſhip arrived in the river *Canton*, in *China*, where ſhe was to ſtay to clean and refit, and for other purpoſes. Upon her arrival there, the ſails, yards, tackle, cables, rigging, apparel; and other furniture, were by the captain's order, taken out of her, and put into a warehouſe, or ſtorehouſe, called a bank-ſaul, built for that purpoſe on a ſand bank, or ſmall iſland, lying in the ſaid river, near one of the banks, called *Bank-ſaul Iſland*; in order to be there repaired, kept dry, and preſerved, till the ſhip ſhould be heeled, cleaned and refitted. Some time after this, a fire broke out in the bank-ſaul belonging to a *Swediſh* ſhip, and communicated itſelf to another bank-ſaul, and from thence to that belonging to the *Onſlow*, and conſumed the ſame, together with all the ſails, yards, *&c.* belonging to the *Onſlow* that were therein. The caſe ſtates further, that it was the *univerſal, and well known uſage*, and has been ſo for a great number of years, for all *European* ſhips, which go a *China* voyage, except *Dutch* ſhips (who for ſome years paſt have been denied this privilege by the *Chineſe*, and who look upon ſuch denial as a great loſs) when they arrive near this *Bank-ſaul Iſland*, in the river *Canton*, to unrig the ſhips, and to take out their ſails, yards, tackle, cables, rigging, apparel, and other furniture; and to put them on ſhore in a bank-ſaul, built for that purpoſe on the ſaid iſland (in the manner that had been done by the captain of the *Onſlow*, on the preſent occaſion) in order to be repaired, kept dry, and preſerved, until the ſhips ſhould * P. 42
be heeled, cleaned, and refitted. The caſe adds, that ſo doing is prudent, and for the common and general benefit of the owners of the ſhip, the inſurers, and inſured, and all perſons concerned in the ſafety of the ſhip. The ſhip arrived from her ſaid voyage in the *Thames*, having been again rigged, and put in the beſt condition, the nature of the place and circumſtances of affairs would permit. The queſtion for the opinion of the court was, whether the inſurers are liable to anſwer for this loſs, ſo happening upon the bank-ſaul, within the intents and meaning of this policy.

The court, after a ſolemn argument, took time to conſider the queſtion, and then Lord *Mansfield* delivered the unanimou opinion of the court for the plaintiff.

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Lord *Mansfield*.—By the expreſs words of the policy, the defendants have inſured the tackle, apparel, and other furniture of the *Onſlow* from *fire*, during the whole time of her voyage, until her return in ſafety to *London*, without any reſtriction. Her tackle, apparel, and furniture, were inevitably burnt in *China*, during the voyage, before her return to *London*. The event then, which has happened, is a loſs within the general words of the policy; and it is incumbent upon the defendant to ſhew, from the manner, in which this misfortune happened, or from other circumſtances, that it ought to be conſtrued a peril, which they did not undertake to bear. If the chance be varied, or the voyage altered, by the fault of the owner or maſter of the ſhip, the inſurer ceaſes to be liable: becauſe he is only underſtood to engage that the thing ſhall be done ſafe from fortuitous dangers, provided due means are uſed by the trader to attain that end. But the maſter is not in fault, if what he did was done in the uſual courſe, and for juſt reaſons. The inſurer, in eſtimating the price at what he is willing to indemnify the trader againſt all riſks, muſt have under his conſideration the nature of the voyage to be performed, and the uſual courſe and manner of doing it. Every thing done in the uſual courſe muſt have been foreſeen, and in contemplation at the time he engaged: he took the riſk, upon a ſuppoſition, that what was uſual or neceſſary ſhould be done. In general, what is uſually done by ſuch a ſhip, with ſuch a cargo in ſuch a voyage, is underſtood to be referred to by every policy, and to make a part of it, as much as if it were expreſſed. The uſage when foreſeen, is rather allowed to be done, than what is left to the maſter's diſcretion, upon unforeſeen events: yet if the maſter, *ex juſtâ cauſâ*, go out of the way, the inſurance continues. Upon theſe principles, it is difficult to frame a queſtion, which can ariſe out of this caſe, as ſtated. The only objection is, that they were burnt in a bank-ſaul, and not in the ſhip; upon land, not at ſea, or upon water: and being appertinent to the ſhip, loſſes and dangers aſhore could not be included. The anſwer is obvious: Firſt, the words make no ſuch diſtinction: Secondly, the intent makes no ſuch diſtinction. Many accidents might happen at land, even to the ſhip. Suppoſe a hurricane to drive it a mile on ſhore; or an earthquake may have a like effect; ſuppoſe the ſhip to be burnt in a dry dock, or ſuppoſe accidents to happen to the tackle upon land, taken from the ſhip, while accidentally and occaſionally refitting, as on account of a hole in its bottom, or other miſchance; theſe are all poſſible caſes. But what might ariſe from an accidental repair of the ſhip, is not near ſo ſtrong, as a certain, neceſſary conſequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation

* P. 43

tion. Here the defendants knew that the ſhip muſt be heeled, cleaned and refitted in the river of *Canton*: they knew that the tackle would then be put in the bank ſaul; they knew it was for the ſafety of the ſhip, and prudent that they ſhould be put there. Had it been an accidental neceſſity of refitting, the maſter might have juſtified taking them out of the ſhip, *ex juſtâ cauſâ*: but deſcribing the voyage is an expreſs reference to the uſual manner of making it, as much as if every circumſtance was mentioned. Was the chance varied by the fault of the maſter? It is impoſſible to impute any fault to him. Is this like a deviation? No: tis *ex juſtâ cauſâ*, which always excuſes. Had the inſurers in this caſe been aſked, whether the tackle ſhould be put in the bank-ſaul, they muſt, for their own ſakes, have inſiſted that it ſhould. They would have had reaſon to complain, if from their not being put there a misfortune had happened. In ſuch a caſe, the maſter would have been to blame, and by his fault would have varied the chance. They have taken a price for ſtanding in *the plaintiff's place, as to any loſſes he might ſuſtain in performing the ſeveral parts of the voyage, of which this was known and intended to be one. Therefore, we are all of opinion, that in every light, and in every view of this caſe, in reaſon and juſtice, and within the words, intent, and meaning, of this policy, and within the view and contemplation of the parties to the contract, the inſurers are liable to anſwer for this loſs.

* P. 44.

Noble and others v. Kennoway. Dougl. 492.

So alſo in a very modern caſe, the ſame principles were adhered to, and the ſame rule of deciſion was adopted. The inſurance was upon the ſhips, the *Hope* and the *Anne*, at and from *Dartmouth* to *Waterford*, and from thence to the port, or ports, of diſcharge, on the coaſt of *Labrador*, with leave to touch at *Newfoundland*, and upon any kinds of goods and merchandizes; and alſo on the ſhips, till they ſhould be arrived at their port of diſcharge, and ſhould have moored at anchor *twenty-four hours, and on the goods until the ſame ſhould be there diſcharged and ſafely landed.* By a clauſe in the policy, money advanced to the fiſhermen was inſured. The *Anne* arrived ſafe on the coaſt of *Labrador*, on the 22d of *June*, and the *Hope* on the fourteenth of *July*, 1778. From the time of their arrival, the crews were employed in fiſhing, and had taken out none of their cargoes, except at leiſure hours (partly on *Sundays*) ſuch things as were immediately wanted. On the thirteenth of *Auguſt*, an *American* privateer entered the harbour, and took both the veſſels, there being at that time nobody on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unneceſſary delay, in unloading the cargoes, in conſequence of which they had been expoſed to capture,

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and that the underwriters ought not to be liable for what had happened from the negligence of the insured. The plaintiffs rested their case on the words of the policy, and the usage of the trade. They called the captain of the *Anne*, who swore, that he had been the same voyage three times, in the three last years, and that they had proceeded in the same manner during each of the voyages; that he did not think the plaintiffs had warehouses sufficient to have held the goods if they had been landed; and that there were no settlements on the coast of *Labrador*, but those belonging to the plaintiffs.

* P. 45. * One of the sailors swore to the same effect. The plaintiffs then called one *French*. to prove the custom of the *Newfoundland* trade. This evidence was objected to; but Lord *Mansfield* admitted it, and the witness swore, that, in the *Newfoundland* trade, it is customary to keep their goods on board several months, and that sometimes they have part of their homeward cargo of fish, and part of their old cargo on board, at the same time. That the first object is to catch fish, and they unload only at times when they cannot fish. The old cargo being chiefly salt and provisions, it is taken out gradually for curing the fish, and for consumption. The testimony of this witness was confirmed by one *Newman*. Neither *Newman* nor *French* had been at *Labrador*. Mr. *Hunter* was then called, who proved, that, some years since, he used to send vessels of his own, and also chartered vessels to *Labrador*, and that it was usual, in chartering vessels, to stipulate, that they should have sixty days allowed for discharging. That he apprehended they were oftentimes longer in fact, and that it was not easy to discharge a cargo at *Labrador*, as at *Newfoundland*. Upon this evidence a verdict was found for the plaintiffs, and in the subsequent term the defendant moved to set it aside, which was not granted.

Lord *Mansfield*.—The trade of fishing on the coast of *Newfoundland*, especially from the west of *England*, has been known and practised for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The insurance here is on the ships, and *on the goods till landed*. The defendant says, the plaintiffs have been guilty of an unreasonable delay in landing. That question was to be tried by the jury, and could only be decided, by knowing the usual practice of the trade. Every underwriter is presumed to be acquainted with the practice of the trade he insures, and, *that*, whether it is recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has been only for a year. This trade has existed, and has been conducted in the same manner for three years. It is well known, that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at *Newfoundland*. I still think the evidence on that subject

ſubject was properly admitted, to ſhew the nature of the trade. The point is not analogous to a common law cuſtom.

* Mr. Juſtice *Buller*.—I think there was ſufficient evidence, without calling in aid the uſage of the *Newfoundland* trade; for it appeared, on the face of the policy, that the fiſhery was the purpoſe of the voyage: but I think the evidence objected to was properly admitted. If it can be ſhewn, that the time would have been reaſonable in one place, that is a degree of evidence to prove, that it was ſo in another. The effect of ſuch evidence may be taken off, by proof of different circumſtances. It is very true, that the cuſtom of one manor is no evidence of the cuſtom of another; that has been determined in many caſes: but the point here is very different; it is a queſtion concerning the nature of a particular branch of trade. The rule was diſcharged. * P. 46

Although the deciſions in all the above cauſes, notwithſtanding the vaſt variety of circumſtances that are to be found in them, are ſo uniform in principle; and although we find, that the learned judges make a conſtant reference to the uſage of trade; yet in no inſtance whatever has this been ſo apparent as in the caſes of inſurance upon *Eaſt India* voyages, in which the inſurers have been held liable, not only of events which may poſſibly happen from the port of diſcharge, to that of delivery, but alſo for all intermediate, or country voyages, upon which the ſhip may be diſpatched by the order of the council of any of the *Eaſt India* Company's ſettlements abroad.

It is not that in theſe caſes, the judges have given a greater latitude to the uſage of trade, than in any other; but becauſe from the great variety of caſes that have ariſen upon the ſubject, the uſage with regard to the *Eaſt India* voyage is more notorious, and better eſtabliſhed than in thoſe, where the queſtion has but ſeldom occurred. The grounds and reaſons of ſuch deciſions ſeem to have been the terms, in which all the printed charter parties of the *Eaſt India* Company are conceived. By thoſe charter parties, liberty is given to prolong the ſhip's ſtay for a year; beſides which, it is very common by a new agreement to detain her a year longer: and the longer a ſhip is kept, it is the more beneficial to the owners. The words of the policy, too, are adapted to this uſage, being without limitation of time or place, and without any reference to the firſt voyage particularly mentioned in the charter party. * P 47 Theſe charter parties, being printed, are matter of public notoriety; and are ſo generally and univerſally known, or may be ſo, by any enquiry at the *India Houſe*, that the chance of her ſtay is always one of the riſks inſured: and both the inſurer and inſured muſt be ſuppoſed to be fully apprized and ſufficiently conuſant of it. Indeed, the underſtanding of the policy depends ſo much on the courſe and uſage of the *Eaſt India* trade,

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that it ſeems to be contradictory to the policy to ſay, that the underwriter did not underwrite for a country voyage.

All theſe principles were fully laid down by Lord *Mansfield* in a very few years after he took upon him the adminiſtration of juſtice in this country; and they have been frequently recognized, and invariably purſued in a multitude of deciſions upon ſuch policies ſince that time. The learned chief juſtice, when he laid down theſe rules, as the ground of his then opinion, and as the guide of future deciſions, ſaid, he did ſo, becauſe the court eſteemed this to be the moſt convenient way of determining the queſtion: for whoever ſhould thereafter inſure on an *Eaſt India* ſhip would know, that he inſured the contingencies, and might take proper precautions againſt them, if he pleaſed. Whereas if every perſon ſhould be obliged to open to the inſurer all the grounds of his expectations about the ſhip's continuance in the *Eaſt Indies*, or coming to *England*, it might produce great litigation and confuſion in caſes ariſing upon theſe policies.

Salvador v. Hopkins, 3 Burr. 1707.

The caſes, in which theſe principles were ſettled, were the nine cauſes tried upon the ſhip *Winchelſea*, an *Eaſt Indiaman*; in all of which the policies were the ſame, the parties only being different; and all of which were at firſt tried with various ſucceſs; but the nine verdicts were ultimately uniform for the plaintiffs, the inſured, againſt the underwriters.

The charter party was in the uſual printed form, and contained a clauſe, empowering the company's ſervants abroad to detain the ſhip a year longer, if they pleaſed, than the time originally limited by the charter party. The inſurance was in theſe words, "at and from *Bengal*, to any ports or places whatſoever in the *Eaſt Indies*, *China*, *Perſia*, or elſe where, be-
• P. 48 "• yond the *Cape of Good Hope*, forwards and backwards, and "during her ſtay at each place, until her arrival at *London*, on "money, &c." On the twenty-fifth of *March* 1762, the ſhip ſailed; on the nineteenth of *September*, in the ſame year, ſhe arrived at *Bombay*; and early in the *November* following, ſhe left *Bombay* the firſt time. The ſhip arrived at *Calcutta*, in *Bengal*, on the fifth of *March* 1763; and on the twenty-eighth of the ſame month, the preſident and council of *Bengal* entered into a new agreement with the captain, reciting, that the charter party would expire on the eleventh of *February*, 1764, but that the preſident and council, finding it expedient to detain the ſhip in *India*, and being deſirous of having the time limited in the charter party prolonged, &c the indenture therefore witneſſeth, that the captain lets the ſhip to freight, for one whole year from the ſaid eleventh of *February* 1764. The ſhip arrived at *Bombay* a ſecond time in *July* 1763: in *December* following, ſhe again ſailed for *Bengal*, and arrived there early in 1764: on the nineteenth of *March* in that year ſhe left *Bengal*,

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in order to proceed for *Bombay*, and on the twenty-first of that month, ſubſequent to the expiration of the old charter party, the ſhip was loſt. On the third of *April* 1764, Mr. *Hume*, the plaintiff in ſeveral of theſe actions, received a letter from the captain, dated the fourteenth of *April* 1763, incloſing a copy of the new agreement: which letter was publickly read in a coffee-houſe. The next day after the receipt of the letter, ſome inſurances were made by Mr. *Hume*. On the ſeventeenth of *July* 1764, other inſurances were effected by Mr. *Hume*, and all the other inſurances were made, after the captain's letter of the fourteenth of *April* 1763, had been received and publickly read in a coffee-houſe. 3 Burr. 1713.

The court after laying down all thoſe principles above ſtated, reſpecting the notorious uſage of this branch of trade enlarged upon the circumſtances peculiarly diſtinguiſhing theſe cauſes. "No mention was made or queſtion aſked, at the time of "underwriting, when the ſhip was chartered; when ſhe ſailed "from *England*; when ſhe arrived in *India*: whether ſhe was "detained a year according to the proviſo in the charter party: "and yet her continuance in the *Eaſt Indies* depended upon "all theſe facts. If they ought neceſſarily to be diſcloſed, the "* policy was void, to the knowledge of the underwriters, at "the time they took the premium. The evidence in all the "cauſes was very ſtrong, that her ſtaying a year longer, if "known, would not have varied the premium. This ſhip "was inſured at the ſame premium after the prolongation of "her ſtay in *India* was known. None of the defendants de-"ſired to be off, after they knew that an account of the new "agreement had been received in *England* upon the third of "*April*, 1764, which was notorious to them all before the "intelligence of her loſs, which came in the *October* following. "So that if there had been any force in the objection, it would "have been waved by the acquieſcence of the underwriters, "after they were fully apprized of the whole." * P. 49

So alſo, in an action upon a policy "on the goods, ſpecie, "and effects of the plaintiff, on board the ſhip on her voyage "from *London* to *Madras* and *China*, with liberty to touch "ſtay, and trade, at any ports or places whatſoever," a ſimilar queſtion aroſe upon the following facts. When the ſhip arrived at *Madras*, ſhe was too late to go to *China* that year; upon which ſhe was employed by the council there to go from *Madras* to *Bengal* to fetch rice, which voyage ſhe performed once, and, in attempting to perform it a ſecond time, was loſt. The jury found a verdict for the plaintiff. Gregory v. Chriſtie. E. R. Trinity. 24 Geo. 3.

A new trial was afterwards moved for on two grounds, one of which only is material here, *viz.* that theſe intermediate voyages were not inſured under the policy; for that the words "to touch, "ſtay, and trade at any ports or places whatſoever" only meant, Vide ſupra chapter the firſt. p. 1. where the other point is ſtated.

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meant, to give a licence to ſtay at ſuch places, as it ſhould be neceſſary to ſtay at *in the courſe of the voyage.*

Lord *Mansfield*—To underſtand this policy you muſt refer to the courſe of trade, to which it relates. What is the courſe of trade with the *Eaſt India* Company? If an *India* ſhip come to *Madras* too late in the ſeaſon to proceed to *China*, the council employs her in an intermediate voyage. It is beneficial to all parties ſo to employ her; the underwriters are perfectly well acquainted with this uſage, and are bound to take notice of it. Before the year 1780, it was uſual to inſure both the outward and homeward-bound voyage in one policy, * and then the words "*backwards and forwards*" were inſerted; but ſince that time, they have ſeparated the inſurance, and inſure the outward voyage in a diſtinct policy. The policy in queſtion differs from others; becauſe it contains a permiſſion to *trade* as well as to *touch and ſtay*, at any ports or places, which is not uſual in policies of this nature; for in general they only permit them to *touch and ſtay*, which words can only be intended to give a permiſſion ſo to do, if neceſſity oblige them; but to *touch, ſtay and trade* are words ſo large, that they ſeem to include the intermediate voyage. It would narrow the conſtruction very much, indeed, to ſay, that the policy relates to thoſe places *only*, at which they ſhall ſtop *in* the voyage. The words made uſe of certainly take in the intermediate voyage; and the uſage of trade confirm this conſtruction. The conſequence of this opinion was, that the verdict of the jury was held to be right.

* P. 50

Farquharſon v. Hunter, B. R. Hilary 25, Geo. 3.

So alſo, in an action on a policy of inſurance upon the ſhip *Blandford*, "at and from *London* to *Madras* and *Bengal*, beginning the riſk upon the ſaid ſhip, &c. at *London*, and ſo to continue till the arrival of the ſaid ſhip at *Madras* and *Bengal*, with liberty to touch and ſtay at any port or place in this voyage:" the facts were theſe. The *Blandford* arrived at *Madras*, where her cargo was unloaded, by order of the preſidency; ſhe was then ſent for rice to *Viſagipatnam*, and by an entry in the council book, her voyage to *Bengal* is ſaid to be poſtponed. That part of her outward-bound cargo, which was intended for *Bengal*, was ſent thither in the *Lord Mulgrave*, and afterwards the *Blandford* was ſent to *Bengal* in ballaſt, and was taken in the paſſage; for which loſs this action was brought. At the trial, Lord *Mansfield* thought the words in the policy would not admit of ſuch a latitude of conſtruction, as to take in the intermediate voyage, the words being much narrower than thoſe in *Gregory* v. *Chriſtie*: upon which the plaintiff was nonſuited.

However, in the following term, when a motion was made to ſet aſide the nonſuit, his Lordſhip ſaid, "This is a policy on the ſhip: it is an *India* voyage: and the uſage as to the

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" intermediate voyages is notorious to both parties; and the " contract refers to it. The insurance here is from *London* to " *Madras* and *Bengal*. What is the usage of the trade? That " when the ships arrive at *Madras*, the council may send them " elsewhere.":—The other judges concurred; and the rule for setting aside the nonsuit was made absolute.

* P. 51

From these cases it is evident, that in the construction of *East India* policies, whether the words be large and comprehensive, as in *Salvador* v. *Hopkins*, and *Gregory* v *Christie*; or restrained and limited as in the last case, the usage of trade shall always be considered, and the intermediate or country voyages held to be insured. At the same time, though the general rule be so, the parties contracting may, by their own agreement, prevent such a latitude of construction; and so Lord *Mansfield* said in *Salvador* v. *Hopkins*. In order to do this, it is not necessary that express words of exclusion should be inserted in the policy; but if, from the terms used, the court can collect that such was the intention of the parties, that construction, which is most agreeable to their intention, shall most assuredly prevail.

Thus, in an action upon a policy, the voyage insured was described in these words: " at and from *Port L'Orient* to *Pondi-* ' *cherry*, *Madras*, and *China*, and at and from thence back to " the ship's port or ports of discharge in *France* with liberty to " touch, *in the outward or homeward bound voyage*, at the isles " of *France* and *Bourbon*, and at all or any other place or places " what or whersoever." In a subsequent part of the policy, there was this clause, " and it shall be lawful for the said ship *in this voy-* " *age*, to proceed and sail to, and touch and stay at any ports or " places whatsoever, as well on this side, as on the other side of " the *Cape of Good Hope*, without being deemed a deviation." The ship arrived at *Pondicherry*, and after remaining there one month, she sailed for *Bengal*, instead of going to *China*: having wintered at *Bengal*, and received considerable repairs, she returned to *Pondicherry*; and having taken in a homeward-bound cargo, proceeded in her voyage back to *L'Orient*, but was taken by the *Mentor* privateer. The question in that case, as far as it is material to us in this part of our work, was whether the voyage to *Bengal* was insured within the construction of this policy. The reporter of this case says, it was insisted, in the opening for the plaintiffs, that, under the general * liberty given by the policy, of touching at all places whatsoever, the vessel might go to *Bengal*, which, by the operation of those words, was as much part of the voyage, as if it had been expressly named.——Lord *Mansfield*, however, having intimated a clear opinion, that the general words were, by the expressions of " *in the outward or homeward bound voyage*," and " *in this voyage*," qualified and restrained so as to mean all

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Mr. Douglas.

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places

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places whatſoever in the uſual courſe of the voyage "*to and* "*from the places mentioned in the policy,*" this ground was immediately abandoned, and never farther mentioned by the counſel for the plaintiffs in the progreſs of theſe cauſes.

But although the judges have been thus liberal in their conſtructions of this contract, and have gone as far as poſſible to effectuate the intention of the parties; yet they have never extended thoſe equitable principles to ſuch a length as to ſay, that when a man has inſured one ſpecies of property, he ſhall recover damage, which he has ſuffered by the loſs of a deſcription of property, different from that named in the policy. Thus a man, who has inſured a cargo of goods, cannot recover under ſuch a policy, the freight, which he has paid for the carriage of that cargo; nor ſhall it be permitted to an owner of a ſhip who inſures the *ſhip merely*, to demand ſatisfaction for the loſs of merchandize laden thereon, or to aſk from the inſurers *extraordinary wages paid to the ſeamen, or the value of proviſions conſumed*, by reaſon of the detention of the *ſhip* at any port longer than was expected.

See Poſt 53

Such attempts have, indeed, been made, but they have always been reſiſted: for to admit of ſuch demands would introduce an infinite variety of frauds, and would be repugnant to the moſt ſettled maxims of inſurance law, and to the conſtant practice and uſage of trade. In *Molloy* it is ſaid, that if a merchant inſure a ſhip generally, and the ſhip then happen to be laden, and if it afterwards miſcarry, the inſurer ſhall not anſwer for the goods, but only for the ſhip. This poſition ſtands uncontradicted by any foreign writer ancient or modern, and is ſupported by ſeveral deciſions of the firſt authority in this country.

Molloy b. 2. c. 7. ſ. 8

Roccus de Aſſecur. Not. 16.

* P. 53 * In an inſurance *upon the ſhip Tartar* at and from *London* to *Newcaſtle*, and *Marſeilles*, and at and from *Marſeilles* to her diſcharging port or ports in the *Weſt Indies* (*Jamaica* excepted), the facts were, that the ſhip being diſtreſſed bore away for *Minorca*, and put into *Fort Mahon*, where the captain obtained leave from the vice admiralty court, to have his ſhip ſurveyed, in conſequence of which, ſhe was long detained; and the action was brought to recover the extraordinary wages, and the proviſions expended during the detention for theſe repairs.

Fletcher and Others v. Poole, Sitt after Eaſt. 1709, before Lord Mansfield at Guildhall.

Lord *Mansfield* was of opinion, that ſuch articles as ſailors wages and proviſions expended, while a ſhip is detained to refit, can never be allowed as a charge againſt the inſurer *on the ſhip*; and a verdict was accordingly given for the defendant.

In another cauſe, after a trial at *Guildhall*, a ſpecial caſe was reſerved for the opinion of the court, ſtating, that this was an action upon a policy of inſurance *on goods* at and from *Nevis* to *Briſtol*. The ſhip ſailed from *Nevis*; but, before her arrival

Baillie v. Mourgliau, B. R. Hil. 25 Geo. 3.

at

at *Briſtol*, ſhe was captured and taken into *Morlaix*, and there condemned. An appeal was lodged in the parliament of *Paris*, where the ſentence was reverſed, and the ſhip and cargo were decreed to be reſtored. Before the ſentence of reſtitution, the ſhip and cargo had been ſold; but the money was paid, the charges of proſecuting the appeal being deducted. The defendants have paid all the charges of the ſuit, and the ſalvage, except the ſum now in demand, which was paid by the plaintiffs, as owners of the goods to the owner of the ſhip for *freight pro ratâ itineris:* and for which *freight* this action is brought on the policy *on goods*.

After time taken to deliberate, Lord *Mansfield* delivered the unanimous opinion of the court for the defendants: the *item* now in litigation, his lordſhip ſaid, is that which was paid for freight, by the owner of the cargo to the proprietor of the ſhip *pro ratâ itineris*. The queſtion is, whether he can charge theſe underwriters for it. As between the owners of the ſhip and cargo, in caſe of a total loſs, no freight is due: but as between them no loſs is total, where part of the property is ſaved, and the owner takes it to his own uſe. In this caſe, the • value of the goods was reſtored in money, which is the ſame as the goods; and therefore freight was certainly due *pro rata itineris*. But as between the owners of the goods, and the underwriters *upon the cargo*, the latter have nothing to do with the *freight*. The owner of the ſhip has a lien for his freight; but in a total loſs, literally ſo called, no freight is due. In caſe of a loſs, total in its nature, with ſalvage, the owner may either take the part ſaved, or abandon: but in neither caſe, can he throw the freight upon the underwriters; becauſe they have not engaged to indemnify him againſt it.

i.e. goods

• P. 54

This alſo was an action upon a policy of inſurance, which was on the *ſhip and goods* from *Oſtend* to *Dominique*. The following facts appeared in evidence: that the ſhip met with bad weather, and was in great diſtreſs: that the crew threatened to take the command from the captain, unleſs he would make for the firſt port: that he then went to *Ferrol* to repair his ſhip, and by the time the repairs were finiſhed, the crew forſook her: that he then got another crew, and at the moment he was going to ſail, the *Spaniſh* governor ſtopped him: that after a detention of 37 days, ſhe was diſcharged, and then arrived at *Dominique*. This action was brought for the expence incurred by wages, proviſions, &c. during the demurrage at *Ferrol*. On the part of the inſurer it was contended, and ſo held by Mr. Juſtice *Buller*, who preſided upon that trial, that the freight, and not the ſhip, is liable for this loſs, and that the charge of demurrage could not be allowed upon this policy. The plaintiff was nonſuited.

Eden v. Poole, Sitting after Hil. 1785.

Agreea-

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Agreeably to the above doctrine, there is a very modern deciſion of the whole court of King's Bench. That alſo was an action on a policy of inſurance, on the ſhip *Dumfries*, at and from *London* to *Africa* during her ſtay and trade there, and at and from thence to her port or ports of diſcharge in the *Britiſh Weſt India* iſlands, to recover a partial loſs. The facts were, that this ſhip, in the courſe of the laſt war, after performing her voyage to *Africa*, in coming from thence laden with ſlaves, to the *Weſt Indies*, touched at *Barbadoes* in *December* 1781, for the purpoſe of watering, at which iſland an embargo was laid on all ſhips, by order of Lord *Hood*, the commander in chief upon that ſtation; and the veſſel was detained a conſiderable * time. The captain applied for leave to depart; but was refuſed: whereupon he attempted to ſail away privately in the night, but was purſued by the *Salamander* ſloop of war, and after a ſlight engagement, he was brought back, the *Dumfries* not having ſuſtained any damage, for which the underwriters could be charged, on account of a clauſe, exempting them from partial loſſes, not amounting to 3 *per cent*. Lord *Hood*, in conſequence of this breach of embargo, upon her return took almoſt all the men out of the *Dumfries*, diſperſed ſome of the crew among the ſhips of war, the captain and the reſt of the crew were confined; and the ſhip was detained at *Barbadoes*, till the *April* following. This detention however was not proved to have ariſen ſolely from the embargo, as it appeared, that for ſome part of the time, the ſmall-pox prevailed among the ſlaves, and that the embargo was frequently taken off and renewed between *December* and *April*. The action was brought to recover from the inſurer *upon the ſhip* the additional *wages* paid to the ſeamen, and the *charges for proviſions*, during this detention.

Robertſon v. Ewer, B. R. Hill. 26 Geo. 3. Term Reports, p. 127.

* P. 55

Mr. Juſtice *Buller* was of opinion, at the trial, that the only damages proved, being items for ſeamens wages, proviſions, and demurrage, during the detention, could not be recovered under this policy on the ſhip only. To make the underwriter liable, there muſt be a loſs of the ſhip, for the policy is on the body of the ſhip only; and if ſhe arrive ſafe at her port of delivery, be the voyage ever ſo long, you cannot recover under ſuch a policy: if, indeed, ſhe be in ſuch a ſtate as to prevent her from completing her voyage, it is certainly a loſs. The plaintiff was nonſuited.

In the following term a motion was made to ſet aſide the nonſuit, which, after argument, was refuſed by the whole court to be done, and upon that occaſion Lord *Mansfield* ſaid: There is no authority to ſhew, that on this policy, the inſured can recover for ſuch a loſs; but it is contrary to the conſtant practice. On a policy on a *ſhip*, ſailors wages or proviſions are never allowed in ſettling the damages. The inſurance

on

on the *body of the ſhip*, tackle, and furniture; *not on the voyage or crew.* In this caſe it is admitted, that there was no damage * done to the ſhip, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover. * P. 56

Mr. Juſtice *Buller.*—I take it to be perfectly well ſettled, that you are not to recover on a policy on the body of the ſhip for ſeamens wages or proviſions; theſe are not the ſubject of the inſurance. The caſe put at the bar proves the rule. For if the ſhip had been detained in conſequence of any injury which ſhe had received in a ſtorm, though the underwriter muſt have made good that damage, yet you could not have come upon him for the amount of wages or proviſions, during the time ſhe was ſo repairing. Here the ſhip itſelf is ſafe; and the court only look to the thing itſelf, which is the ſubject of inſurance; and the wages and proviſions are no part of the thing inſured.

It is alſo neceſſary, in order to intitle the inſured to recover, that the loſs, which has happened, be a direct and immediate conſequence of the peril inſured, and not a remote one. This doctrine was laid down in a caſe before Lord *Mansfield*, and the deciſion of the jury was agreeable to the principle ſtated by the Chief Juſtice.

It was an action on a policy of aſſurance "at and from "*Briſtol* to the coaſt of *Africa*, during her ſtay and trade there, "and from thence to her port or ports of diſcharge in the *Weſt-* "*Indies.*" There was a memorandum on the policy, that "the aſſurers are not to pay any loſs that may happen in boats "during the voyage (mortality by natural death excepted) "and not to pay for mortality by mutiny, unleſs the ſame "amount to 10*l. per cent* to be computed on the firſt coſt of "the ſhip, outfit, and cargo, valuing negroes ſo loſt at 35*l.* "per head." The demand upon the policy was the loſs of a great many ſlaves by mutiny. The evidence of the captain was, that he had ſhipped 225 prime ſlaves on board: that on the third of *May*, before he ſailed from the coaſt of *Africa*, an inſurrection was attempted; that the woman ſeized him on the quarter deck, and endeavoured to throw him overboard, but he was reſcued by the crew; that the woman and ſome men threw themſelves down the hatchway, and were much bruiſed. That he ſent the ringleader on ſhore, and twelve men and a woman * afterwards died of thoſe bruiſes, and from abſtinence: that on the 22d of *May* there was a general inſurrection, the crew were forced to fire upon the ſlaves, and attack them with weapons, it being a caſe of imminent neceſſity. Several ſlaves took to the ſhip's ſides, and hung down in the water by the chains, and ropes, ſome for about a quarter of an hour, three were killed by firing, and three were drowned, the reſt were taken * P. 57

Jones v. Schmoll. Guildh. Tr. Vac. 1785. 1 Term Rep. p. 130. Note (a.)

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ken in, but they were too far gone to be recovered; many of them were desperately bruised, many died in consequence of the wounds they had received from the firing during the mutiny, some from swallowing salt water, some from chagrin at their disappointment, and from abstinence; several of fluxes and fevers; in all to the amount of 55. The underwriter had paid at the rate of 15 *per cent* for 19, who were either killed during the mutiny, or had afterwards died of their wounds. Another consequential damage was stated, that the mutiny had lessened the remaining slaves in the estimation of the planters, and reduced their price.

Lord *Mansfield* said, as to the latter loss, I think the underwriter is not answerable for the loss of the market, or the price of it: that is a remote consequence, and not within any peril insured against by the policy.

The question for the jury will be, whether any of those who died by any other means, except by being fired upon, or in consequence of the wounds and bruises which they received during the struggle, are within the meaning of the policy which insures against damage by mutiny. The policy is in the common form, and if it were not for the memorandum, I should say, the case was not within the instrument. But as it now stands, it is very clear, that those who were killed by the firing, or died in consequence of their wounds, are within the policy; the other complicated cases must be left to the jury, The first class, such as were killed in the fray, certainly come within the meaning of the policy; and the second class also, those who died of the wounds they received. The third class are, I think, as clearly not within it, such as being baffled in their attempts, in despair chose a mode of death. by fasting, or died through despondency: that is not * mortality by mutiny, but the reverse, for it is by *failure of mutiny*, The great class are such as received some hurt by the mutiny, but not mortal, and died afterwards of other causes, as those who swallowed water, jumped overboard, &c. This is the great point.

* P. 58

The jury found, that all who were killed in the mutiny, or died of their wounds, were to be paid for. That all those who died of their bruises, which they received in the mutiny, though accompanied with other causes, were to be paid for. That all who had swallowed salt water, and died in consequence thereof, or who leaped into the sea, and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin, were not to be paid for.

In the construction of policies of insurance for time, which, are very frequent, the same liberality, equity, and good sence have alwaysprevailed, as in all other insurances: and the courts have

have gone as far as poſſible, to decide according to the intention of the parties.

In an action on a policy of inſurance on the ſhip *Mary*, a letter of marque, the words of the policy were, " at and from " *Liverpool* to *Antigua*, *with liberty to cruiſe ſix weeks*, and " to return to *Ireland*, or *Falmouth*, or *Milford*, with any prize " or prizes." This ſhip having been taken, this action was brought, and came on to be tried before Baron *Hotham*, at *Lancaſter*, when a verdict was found for the plaintiffs. Syers and Others v. Bridge. Dougl. 509

Upon a motion for a new trial, the material parts of the evidence were, that the policy was made on the 9th of *February*, 1779, and there was no time fixed in it for the commencement, or the duration of the voyage. The captain of the ſhip, being called on the part of the plaintiffs, ſwore that he in fact, ſailed from *Liverpool* on the 28th of *February*: he was five days before he cleared the land; and he proceeded on his direct voyage till the 14th of *March*, chaſing, however, at different times, from the 7th to the 14th, at which time he began his cruiſe, giving notice thereof to the crew, and ordering a minute of it to be entered in the log book, which was done. From the 14th of *March*, he continued cruiſing about the ſame latitude till the 17th or 18th of *April*; * when he diſcontinued the cruiſe, of which he alſo gave notice, intending to go to the *Burlings*, off *Liſbon*, in the courſe of his voyage. On the 23d he renewed the cruiſe, of which he gave notice, as before, and ordered a minute, to that purpoſe, to be entered in the log-book. From that time he continued cruiſing till the 28th of *April*, when he was taken by an *American* privateer. Many witneſſes were examined, ſome of whom thought, that the liberty of cruiſing, given by the policy, meant ſix ſucceſſive weeks; others conceived, that if the ſeparate times of cruiſing, when added together, ſhould not exceed the ſpace of ſix weeks, the terms of the inſurance would be complied with; but none of them could prove any uſage, as none of the witneſſes ever knew a caſe exactly circumſtanced like the preſent. * P. 59

Lord *Mansfield*.—This was merely a queſtion of conſtruction, on the face of the policy, and unleſs an uſage could have been ſhewn in favour of this deſultory cruiſing, calling witneſſes to ſupport it, was calling them to ſwear to mere opinion. None of thoſe produced knew of any inſtance; and therefore, their evidence ought not to have been received. Yet, I dare ſay, their teſtimony had great weight with the jury. The meaning of words depends upon the ſubject. The inſtructions were not read, but they ſhew the meaning very clearly, for they run thus: " To cruiſe ſix weeks, and *then* " proceed to *Antigua*." There can be no general rule. Here the ſubject matter, in my opinion, is deciſive to ſhew, that the ſix weeks meant one continued period of time. A cruiſe

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is a well known expreſſion for a connected portion of time. There are frequently articles for a month's cruiſe, a ſix week's cruiſe &c. Such a liberty, as in this caſe, to a letter of marque, is an excuſe for a deviation. But what is contended for by the plaintiffs is impoſſible in practice. Suppoſe the ſhip returns *directly back*, cruiſing for the ſpace of a week. She may then perhaps take three weeks to return to where ſhe had been. Can ſhe then renew the cruiſe, return again, and ſo repeatedly? The voyage, in that way, might laſt for years But the true meaning is, "I will excuſe a deviation "for ſix weeks." The inſtructions, although it happens they were not read, ſtrike me much. Another argument: Six weeks is a continuation, a congregate denomination of time.

*P. 60 * If they had meant ſeparate days, they would have ſaid forty-two days. The rule for a new trial was made abſolute.

Having ſaid thus much of conſtruction in general, by which it appears, that the material rules to be adhered to, are the intention of the parties entering into the contract, and the uſage of trade; it will be proper to conſider more particularly, what ſhall be conſtrued a loſs within the meaning of the policy. This mode of treating the ſubject naturally leads us to conſider loſſes by perils of the ſea; loſſes by capture, and by detention of princes or people; and loſſes by the barratry of the maſters or mariners; which are the great diviſions of perils inſured, and which will furniſh materials for the three following chapters.

*P. 61

*CHAPTER THE THIRD.

Of Loſſes by Perils of the Sea.

THE ſubject matter of this chapter may be reduced to a very ſmall compaſs; as very few queſtions have ever been agitated in the *Engliſh* courts of law, upon this point. It may, in general, be ſaid, that every thing which happens to a ſhip, in the courſe of her voyage, by the immediate act of God, without the intervention of human agency, is a peril of the ſea.

1 Shower 323. Roccus. Not. 64.

Thus, in an inſurance againſt perils of the ſea, every accident happening by the violence of wind or waves, by thunder and lightning; by driving againſt rocks, by the ſtranding of the ſhip,

1 Magens. 52, 76.

or by any other violence which human prudence could not foreſee, nor human ſtrength reſiſt, may be conſidered as a loſs within the meaning of ſuch a policy: and the inſurer muſt anſwer for all damages ſuſtained, in conſequence of ſuch accident. In caſes where the loſs is not total, but only partial, ariſing from a leak

a leak, from the ſtranding of the ſhip, or from the loſs of her maſts, cables, or rigging, the inſurers upon the cargo are liable to reſtore the value of all the damaged goods, and the underwriter upon the ſhip is alſo anſwerable for all the injury which ſhe has ſuſtained.

In charter parties, if the veſſel freighted was robbed or taken by pirates, that was held to be a loſs within the meaning of the words "perils of the ſea." It is alſo ſaid, that the ſame rule of conſtruction prevails as to policies of aſſurance. That poſſibly might, and would be the true conſtruction upon thoſe words: but as it is now the univerſal cuſtom to inſure againſt the attacks of pirates, by expreſs words inſerted in the policy, that queſtion can now hardly ariſe. 2 Roll. Abr. 248. pl. 10. Comberbatch. 56.

Although the courts in this caſe, as in all others, will endeavour to give effect to this ſpecies of contract, by a liberal and equitable conſtruction; yet they will be cautious not to extend the principle ſo far, as to ſay, that the acts of the parties ſhall be made to operate beyond their intention; and therefore they will attend to the words of the contract, and ſee that the loſs, which has proved to have happened, is really one of thoſe riſks againſt which the underwriter has inſured. * P. 62

An action was brought upon a policy of inſurance for the value of certain ſlaves, inſured by that policy. The declaration ſtated, "that by perils of the ſea, contrary winds, currents, "and other misfortunes, the voyage was ſo much retarded, that "a ſufficient quantity of water did not remain for the ſupport "of the ſlaves, and other people on board, and that certain of "the ſlaves mentioned in the declaration, periſhed for want of "water." The facts, appearing in evidence, were, that the ſhip, being bound from *Guinea* to *Jamaica*, had miſſed the iſland, and the crew were reduced to great diſtreſs for want of water: that the captain conſulted with the crew, and it was unanimouſly agreed upon, that ſome of the ſlaves ſhould be thrown overboard, in order to preſerve the reſt: that at the time this reſolution was formed, there remained but one day's full allowance of water, at two quarts per man. The jury, upon this evidence, found a verdict for the plaintiff, with damages at 30*l.* a head for every ſlave thrown overboard. Greeſon v. Gilbert, B. R. Eaſter. 23. Geo 3.

A motion was afterwards made for a new trial, upon the ground, that this was not a loſs by perils of the ſea.

Lord *Mansfield*. This is a very uncommon caſe, and deſerves a further conſideration. There is great weight in the objection, that the loſs is ſtated, by the declaration, to have ariſen from the perils of the ſea, and that the currents, &c. had made the ſhip foul and leaky. Now does it appear by evidence, that the ſhip was foul and leaky? On the contrary, the loſs happened by miſtaking *Jamaica* for another place. Beſides, a fact has been mentioned by the counſel of throwing

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ſome overboard after the rain fell, a fact, which is not agreed on by both ſides, though a very material one.

* P. 63

* Mr. Juſtice *Buller*.—The declaration does not, in any part of it, ſtate the loſs, which has been the occaſion of this demand; and it would be very miſchievous, if we were to overturn this objection. Suppoſe, for a moment, that the underwriters, in ſome caſes, are liable for the miſtake of the captain, yet, if they are not liable in others, the nature of the loſs muſt be ſtated in the declaration, that the defendant may have an opportunity of moving in arreſt of judgment, if it be not ſufficiently alledged. But it would be impoſſible for the defendant in this caſe to move in arreſt of judgment; for the facts of the caſe, as proved, are different from thoſe ſtated in the declaration. The point of law in arreſt of judgment can only be argued from the facts ſtated on record; and the declaration in this caſe ſtates the loſs of the plaintiff to have happened by perils of the ſea. The rule for a new trial was made abſolute, on payment of coſts.

If a ſhip has been miſſing and no intelligence received of her within a reaſonable time after ſhe ſailed, it ſhall be preſumed that ſhe has foundered at ſea.

Green v. Brown. 2 Stra. 1199.

The ſhip *Charming Peggy* was inſured in 1739, from *North Carolina* to *London*, with a warranty againſt captures and ſeizures, and in an action the loſs was laid in the declaration to be by ſinking at ſea. All the evidence given was, that ſhe ſailed out of port on her intended voyage, and has never ſince been heard of. Several witneſſes proved, that, in ſuch a caſe the preſumption is, that ſhe periſhed at ſea, all other ſorts of loſſes being generally heard of. It was inſiſted for the defendant, that as captures and ſeizures were excepted, it lay upon the plaintiff to prove, that the loſs happened in the particular manner declared on. But Lord Chief Juſtice *Lee* ſaid, it would be unreaſonable to expect certain evidence of ſuch a loſs where every body on board is preſumed to be drowned: and all that can be required is the beſt proof the nature of the caſe admits of, which the plaintiff has given. He therefore, left it to the jury, who found according to the plaintiff's declaration.

Newby v. Read, Sittings after Michaelmas, 3 Geo. 3.

The ſame doctrine was held in a more modern caſe before Lord *Mansfield*. It was an action of covenant on a deed, in the * nature of a policy of inſurance, by which the defendants were bound to inſure againſt any loſs happening before the 30th of *November*, 1762, free from average. The ſhip ſailed from *Newcaſtle* to *Copenhagen*, which is uſually about ten days voyage. She was ſoon after taken by a *French* privateer but ranſomed; and ſhe then proceeded on her voyage to *Copenhagen*, (as was proved by the ranſomers) in a bad condition. She was never heard of afterwards, though all due diligence

* P. 64

had

had been uſed; and ſeveral ſhips, which ſailed after her, were proved to have arrived ſafe at *Copenhagen*. CHAP. IV.

Lord *Mansfield* told the jury, that this evidence was a ſufficient ground to preſume that ſhe periſhed at ſea, unleſs the contrary appeared. The jury accordingly found for the plaintiffs.

I have not been able to find any regulation in the law of *England*, or the uſage of merchants, fixing a limited time, within which the aſſured may demand payment for his loſs, in caſe no accounts arrive of the ſhip, upon which inſurance is made. Indeed, from the nature of the thing, what ſhall be a reaſonable time, in ſuch caſes, muſt always depend upon a variety of obvious circumſtances. I underſtand, however, a practice has prevailed among inſurers, which ſeems reaſonable enough, that a ſhip ſhall not be deemed loſt, if not heard of in ſix months after her departure, (or after the time of the laſt intelligence from her) for any part of *Europe*; and in twelve months, if for a greater diſtance. The only objection to ſuch a practice is, that the latter period does not ſeem ſufficient in *India* voyages. However, that is a matter for the inſurer's conſideration; and even if he ſhould pay the money under a miſtake, ſuppoſing the ſhip loſt, when it really is not, he might, as we ſhall ſee hereafter, if the inſured were unwilling to refund, recover it back, in an action for money had and received to his uſe. Salk. 22. Vide Poſt, chap. 20.

In *Spain* and *France*, this matter, however, is not left to uncertainty; but the time, within which ſuch *loſſes* may be demanded, is fixed and aſcertained by expreſs regulations. By the ordinances of the former, if any ſhip inſured on going to, or coming from the *Indies*, is not heard of in a year and a half after her departure from the port where ſhe loaded, it is declared that ſhe is, and ſhall be deemed loſt: by thoſe of the latter it is ſaid, that if the inſured receive no news of his ſhip, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for thoſe at a greater diſtance, make his ceſſion to the underwriters, and demand payment, without being obliged to produce any certificate of the loſs. 2 Magens 33. * P. 65. 2 Magens 177. Ord. of Lewis 14. l. 31. art. 58.

CHAPTER THE FOURTH. * P. 66

Of Loſſes by Capture and Detention of Princes.

CAPTURE, as applied to the ſubject of marine inſurances, may be ſaid to be a taking of the ſhips or goods belonging to the ſubjects of one country, by thoſe of another,

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when in a ſtate of public war. What ſhall be conſidered as a capture, ſo as to render an inſurer liable under a policy, inſuring againſt captures, has now become a queſtion of very little difficulty.

2 Burr. 694. 1ſt Point in Goſs v. Withers.

The law upon this ſubject is perfectly ſettled in *England*, between the inſurer and the inſured: and it is this, that the ſhip is to be conſidered as loſt by the capture, though ſhe be never condemned at all, nor carried into any port or fleet of the enemy: and the inſurer muſt pay the value. If, after a condemnation, the owner recover or retake her, the inſurer can be in no other condition, than if ſhe had been retaken or recovered before condemnation. The inſurer runs the riſk of the inſured, and undertakes to indemnify; he muſt therefore bear the *loſs*, actually ſuſtained, and can be liable to no more. So that if, after condemnation, the owner recovers the ſhip in her complete condition, but has paid ſalvage, or been at any expence in getting her back, the inſurer muſt pay the loſs ſo actually ſuſtained. No capture by the enemy can be ſo total a loſs, as to leave no poſſibility of recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by a late act of parliament, if an *Engliſh* ſhip retake the veſſel captured, either before or after condemnation, the owner is entitled to reſtitution upon ſtated ſalvage. This change does not, however, ſuſpend the demand for a total loſs upon the inſurer: but juſtice is done, by putting him in the place of the inſured, in caſe of a recapture.

2 Bur. 696

29. Geo. 2. c. 34. ſ. 24.

P. 67

* Theſe principles, which are agreeable to the ideas of foreign writers, were ſettled by Lord *Mansfield*, and the whole court of King's Bench, in *Goſs* againſt *Withers*, (which will be cited at length when we come to treat of abandonment) and which have never ſince been diſputed. It has likewiſe been held, that where a capture has been made, whether it be legal or not, the inſurers are liable for the charges of a compromiſe made, *bonâ fide*, to prevent the ſhip from being condemned as prize. It is true, the only caſe I have been able to find to this point is a *niſi prius* note; but when we conſider the high authority from which this doctrine is taken, and that the thing in itſelf is not at all repugnant to the general principles of the law of inſurance, it certainly has a claim to our attention.

Rocci Selecta reſponſa. Reſp. 34. 2 Burr. 683.

It was an action on a policy of inſurance on a *Dutch* ſhip called the *Tyd*, and its cargo, at and from *Saint Euſtatius* to *Amſterdam*, warranted a *Dutch* ſhip, and the goods *Dutch* property, and not laden in any *French* port in the *Weſt Indies*. The cargo was worth 12,000*l.* and was inſured at a premium of fifteen guineas *per cent.* which was advanced to this high rate, on account of the number of captures made by the *Engliſh*, of neutral veſſels, on ſuſpicion of illicit trade, and the detention of thoſe veſſels, by the proceedings in the courts

Berens v. Rucker. 1 Black. 313.

of

of admiralty. The defendant underwrote 82*l.* of the plaintiff's, for a premium of 12*l.* 18*s.* 3*d.* In *May*, 1758, the ſhip was at *Saint Euſtatius*, taking in her cargo, which conſiſted of ſugar and indigo, and other *French* commodities, which were put on board her, partly out of barks from ſea, partly from the ſhore of the iſland. On the 18th of *June*, 1758, ſhe ſailed on her voyage; on the 27th ſhe was taken by an *Engliſh* privateer, and carried into *Portſmouth*. On the 1ſt of *Auguſt*, the ſailors were examined upon the ſtanding interrogatories, preſcribed by the ſtatute 29 *Geo.* 2. *c.* 34. and the captain entered his claim in the Admiralty court. In *October*, 1758, the claimants were cited to ſpecify what part of the goods was taken from the ſhore of *Saint Euſtatius*, and what from the barks. Citation was continued from court to court till *February*, 1759, when an interlocutory decree was pronounced for the contumacy of the claimants in not ſpecifying, and that therefore the goods ſhould be * preſumed *French* property. There was an appeal to the lords commiſſioners of prizes: but as many cauſes ſtood before it, as the market was very high, and as the cargo was in part periſhable, the agent of the owners agreed with the captors to give them 800*l.* and coſts, to obtain the reverſal of the ſentence. The reverſal was had by conſent, and, in order to give coſts to the captor, it was decreed by conſent, that there was a ſufficient cauſe for ſeizure; and thereupon coſts were decreed to the captors, and reſtitution of the cargo to the owners was alſo ordered. The ſhip, when reſtored, proceeded to *Amſterdam*; and after her arrival there, the Chamber of Inſurances in that city ſettled the average of the plaintiff towards the loſs and expences at 14*l.* 3*s.* 8d. occaſioned by the capture, detention and litigation; and for this ſum the action was brought,

* P. 68

Lord *Mansfield*—The firſt queſtion is, whether this was a juſt capture? Both ſentences are out of the caſe, being done and undone by conſent. The capture was certainly unjuſt. The pretence was, that part of this cargo was put on board off *Saint Euſtatius*, out of barks, ſuppoſed to come from the *French* iſlands, and not loaded immediately from the ſhore. This is now a ſettled point by the Lords of Appeal, to be the ſame thing as if they had been landed on the *Dutch* ſhore, and then put on board afterwards; in which caſe there is no colour for ſeizure. The rule is, that if a neutral ſhip trade to a *French* colony, with all the privileges of a *French* ſhip, and is thus adopted and naturalized, it muſt be looked upon as a *French* ſhip, and is liable to be taken. Not ſo, if ſhe have only *French* produce on board, without taking it in at a *French* port: for it may be purchaſed of neutrals.

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Second queſtion is, whether the owners have acted *bona fide*, and uprightly, as men acting for themſelves, and upon a reaſonable footing; ſo as to make the expences of this compromiſe a loſs to be borne by the inſurers. The order of the judge of the Admiralty to ſpecify was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; becauſe if they had ſpecified, it could be of no conſequence, according to the rule I before mentioned. The captors were, however, in poſſeſſion of a ſentence,

* P. 69 * though an unjuſt one: and a court of appeal cannot, or ſeldom does, upon a reverſal, give coſts or damages, which have accrued ſubſequent to the original ſentence; for theſe damages ariſe from the fault of the judge, not of the parties. Under all theſe circumſtances, therefore, the owners did wiſely to offer a compromiſe. The cargo was worth 12,000*l.* the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negotiated the compromiſe; the Chamber of Commerce at *Amſterdam* ratified it, and thought it reaſonable. Had the whole ſentence been totally reverſed, the coſts muſt have ſat heavy on the owners. I therefore think the inſurers liable to anſwer this average loſs, which was ſubmitted to, in order to avoid a total one. The jury found for the plaintiff, agreeably to the above direction.

But though the law upon this ſubject is ſo clearly defined, that at this day it ſeems almoſt impoſſible to raiſe a queſtion, yet it formerly occaſioned much doubt and litigation, what effect a recapture might have upon this kind of contract; and how long it was neceſſary for goods to remain in the hands of the enemy, in order to diveſt the original proprietor of his property in caſe of a recapture.

All theſe doubts are now entirely removed, and can never again be agitated in this country, between an inſurer and inſured; Lord *Mansfield*, for himſelf and his brethren, having

2 Burr.695. declared, in giving judgment in *Goſs* v. *Withers*, that theſe queſtions could never have been ſtarted in policies *upon real intereſt*, becauſe, as we have ſeen, they never could have varied the caſe. But wager policies gave riſe to them; for it

Vide beginning of this Chap. was neceſſary to ſet up a total loſs, as between third perſons, for the purpoſe of their wager, though *in fact* the ſhip was ſafe, and reſtored to the owner. His Lordſhip laid down the

2 Burr. 1198. 19 Geo. 2. c. 37. ſame doctrine in *Hamilton* v. *Mendez*; the conſequence of which is, that as wager policies are now expreſsly prohibited by ſtatute, theſe queſtions can never ariſe upon a policy of inſurance.

2 Burr.693. The only two poſſible caſes, in which they can be material, are: 1ſt, Between the owner and a neutral perſon who has

* P. 70 * bought the capture from the enemy: and, 2dly, Between the owner and recaptor: But whatever rule ought to be followed

in

in favour of the owner, againſt a recaptor or vendee, it can no way affect the inſurance, between the inſurer and inſured.

Notwithſtanding this point is now, as far as relates to our preſent enquiry, no longer a ſubject of uncertainty, it cannot but afford pleaſure to the mind, and, I truſt, it will not be conſidered as impertinent, to trace the opinion of foreign writers upon this queſtion, and to ſtate briefly ſeveral caſes which have been decided in our courts of law here, upon capture and recapture, previous to the ſtatute of 19 *Geo.* 2.

It ſeems to be generally agreed by foreign writers, that it is not every taking and ſubſequent poſſeſſion under that taking, which will conſtitute a capture in the legal ſenſe of the word, or make it become the property of the captor; but that there muſt be a firm poſſeſſion. In this they all agree; but what ſhall be ſuch a poſſeſſion, as to veſt the abſolute property in the captor, is ſo much a matter of doubt, that it is difficult to find two writers of the ſame opinion. Upon this ſubject, various lines have been drawn by arbitrary rules, partly from policy, to prevent too eaſy diſpoſitions to neutrals; and partly from equity to extend the *jus poſtliminii* in favour of the owner. And it is not to be wondered at, that there is ſo great an uncertainty and variety of notions amongſt the writers on this ſubject, about fixing a poſitive boundary by the mere force of reaſon, where the ſubject matter is arbitrary, and not the object of reaſon alone. 2 Burr. 693.

Grotius is of opinion, that the captor ſhall be ſaid to have the property in him, as ſoon as the former owner ſhall have loſt the hope of recovery, and the ability to purſue, and that property ſhall then be ſaid to be *taken*, when it is brought within the enemy's fortreſs. Whence it follows as a conſequence, that in marine captures the capture ſhall be deemed complete, when the ſhips or goods taken ſhall be brought within the harbour or ports of the enemy, or to that place where their whole fleet is ſtationed; for then the recovery may be deſpaired of. But by a more recent law introduced among the *European* nations, it ſeems, that, that only is deemed a capture, which has been twenty-four hours in the poſſeſſion of the captor. The former part of this opinion, I find, was adopted in a caſe in *March's* Reports, where it is ſaid, that the property is not altered, unleſs it be brought *infra præſidia* of the enemy: and ſome nations have made twenty-four hours quiet poſſeſſion by the enemy the criterion of their judgment. Thus by the ordinances of *Lewis* the fourteenth it is declared, that if any of the ſhips of *French* ſubjects be retaken from their enemies, after having been twenty-four hours in their hands, they ſhould be good prize; and if it be before twenty four hours, they ſhall be reſtored to the owners, with all that is in them, and one third ſhall be given to the ſhip that retakes them. *Bynkerſhoek*, however, ſtates the Grotius de jure belli, lib. 3. c. 6. 3. * P. 71. March 210. Ord. of Law. f. 34. art. 8.

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the opinion of *Grotius*, controverts it with much ability, and seems to think, that the *spes recuperandi* is the ground on which the question is to be decided. He mentions the opinion of some writers, who think, that it is necessary for the ship to have arrived in the enemy's port, to have been condemned, to have sailed out again, and arrived in a friend's port, before the property can be said to be changed. *Roccus* rather states the various opinions of others, than asserts one of his own; but he seems to lean to the idea, that it is necessary to bring the ship within the confines of the captor, and to keep it there a night in safe custody. But as was said by Lord *Mansfield*, all these circumstances are very arbitrary, and therefore are generally exploded.

Bynkershoek quæst. publ. juris. lib. 1. c. 4.

Roccus Not. 66. 2 Black. Com. 401.

2 Burr. 694.

2 Burr. 694. By the marine law of *England*, as practised in the court of Admiralty, previous to the passing of any act of parliament, which commanded restitution, or fixed the rate of salvage, it was held, that the property was not changed so as to bar the owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. Agreeably to this principle, judgment was given in that court, decreeing restitution of a ship retaken by a privateer, though she had been fourteen weeks in the enemy's possession. Another case also, upon the same principle, was decided against the vendee after a long possession, two sales, and several voyages.

Thus stands the marine law of *England*, by which it appears, that the *jus postliminii* continues till condemnation, which, by the act of parliament, about to be quoted, is extended, and now continues for ever.

* P. 72

29 Geo. 2. c. 34. s. 24

It is enacted, and a similar provision had been made by the 13th of *George* the Second, chap. 4. "That if any ship, vessel, "or boat, taken as prize, on any goods therein, shall appear, "and be proved in the admiralty court, to have belonged to any "of his Majesty's subjects, which were before taken by any of "his majesty's enemies, and at any time afterwards retaken "by any of his majesty's ships of war, or any private man of war, "or other ship, vessel, or boat, under his majesty's protection "and obedience, that then such ships, vessels, boats, and goods, "shall in all cases be adjudged to be restored, and shall be "by decree of the said court of admiralty, accordingly restored "to the former owners, they paying in lieu of salvage, if retaken "from the enemy by one of his majesty's ships of war, one "eighth part of the true value of the property restored: and if "retaken by a privateer, or other ship, before it has been in "possession of the enemy twenty-four hours, one-eighth part of "the true value of such goods; and if it has been in the pos-"session of the enemy above twenty-four, and under forty-"eight hours, a fifth part thereof; and if above forty-eight "and under ninety-six hours, a third part thereof; and if above

"ninety-

" ninety-ſix hours, a moiety thereof; all which payments are to be " paid to any privateer or other ſhip, without any deduction: and " if ſuch ſhip, ſo retaken, ſhall appear to have been ſet forth by " the enemy, as a man of war, the former owners ſhall pay for " ſalvage a moiety of the true value upon the recovery thereof."

From hence it is clear, that by the marine law received and practiſed in *England*, there is no change of property, in caſe of a capture, before condemnation, and that now by the act of parliament juſt recited in caſe of a recapture, the *jus poſtliminii* continues for ever. However, as has been already ſaid, the change of property is not at all material as between the inſurer and inſured, upon policies of real intereſt, which are the only policies that can now by law be effected.

I proceed then to ſtate the caſes, which were determined upon this point, on wager policies, previous to the act of parliament, prohibiting ſuch inſurances.

* The firſt caſe is one in the 10th year of Queen *Anne's* reign, in which the facts upon a ſpecial verdict appeared to be, that the plaintiff had inſured a certain ſum of money upon a ſhip, called the *Ruth*, in a certain voyage, *in which ſhip the plaintiff was found not to be at all intereſted.* It happened that this ſhip was taken by the enemy, and kept in their poſſeſſion for nine days, and then before it was carried *infra præſidia*, it was retaken by an *Engliſh* man of war. Upon theſe facts, the queſtion was, whether or not this was ſuch a taking as ſhould enable the plaintiff to recover the ſum inſured againſt the defendant. * P. 73 Aſſievedo v. Cambridge 10 Mod. 77.

After argument, the court ſeemed to think (but a ſecond argument was ordered, which does not appear from any reporter ever to have been made) that the defendant was entitled to judgment.

Upon this caſe Lord *Mansfield* has obſerved, that the man of war, which retook the ſhip, brought her into the port of *London*, and reſtored her to the owner upon reaſonable redemption; that this appears from the ſpecial verdict, although it is not ſtated in the printed caſe; and then, as the owner did not abandon the ſhip, he could only have come upon the inſurers for the redemption; and no queſtion could have ariſen upon the change of property. Beſides, the policy being intereſt or no intereſt, without beneſit of ſalvage, the queſtion aroſe upon the terms and meaning of the wager. But that caſe was not determined. 2 Burr. 69.

This alſo was an action of *aſſumpſit* on a policy of inſurance, where the defendant inſured the plaintiff, *intereſt or no intereſt*, againſt all enemies, pirates, takings at ſea, and all other damages whatſoever. And upon trial it appeared, that the ſhip was taken by a pirate of *Sweden*, and was in his poſſeſſion for nine days, and was then retaken by an *Engliſh* man of war, and Depaiba. v. Ludlow. Comyn's Rep. 360

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and after the ſuit commenced, was brought into *Harwich*. The queſtion was, whether, in ſuch a caſe, the defendant was reſponſible.

It was determined for the plaintiff. But although it was objected, that the inſurer was only reſponſible, where the plain-
* P. 74 * tiff had a property, and that the term of inſuring, *intereſt or no intereſt*, was introduced ſince the Revolution; yet it was ſaid, that ſuch inſurance was good, and the import of it is, that the plaintiff has no occaſion to prove his intereſt, and that the defendant cannot controvert it. And though the ſhip was here retaken, yet the plaintiff received a damage, for his voyage was interrupted; and the queſtion is not, whether the plaintiff had his ſhip, and did not loſe his property, but what damage he ſuſtained.

2 Burr. 695. Lord *Mansfield* has alſo obſerved upon this caſe, that it was a wager policy, and the property could not be changed, for there was then no war or declaration of war; that the court held, that as the ſhip was once taken in fact, the event had happened, though ſhe was afterwards recovered. His Lordſhip ſaid, that the ſame obſervations were applicable to the caſe of *Pond* v *King*.

Pond v. King. 1 Wilſ. 191. and Lex Merc. red. 4th edit. 302

That was an action on a policy of inſurance upon the *Salamander* privateer (of which the plantiff was part owner) from the *Downs* to any port or place where ſhe ſhould ſail for three months from the 1ſt of *December*, 1744, *intereſt or no intereſt*, free from average, and without benefit of ſalvage; the inſurance was againſt ſuch perils as are uſually mentioned in policies: the breach aſſigned is, that the *Salamander* was taken by a *French* ſhip of war within the three months, and was wholly loſt, whereby ſhe could not proſecute her voyage or cruiſe. The jury found a ſpecial verdict, ſtating, that the *Salamander* was taken by a *French* ſhip of war within the three months; that 117 of her men were taken out of her, and carried into *France*, and her guns taken out, and that ſhe remained in the poſſeſſion of the enemy from four o'clock in the afternoon of the 2d of *February* till five o'clock in the afternoon of the 5th of *February*; that before ſhe was caried into any port, ſhe was retaken by an *Engliſh* privateer, and by the captain of the privateer kept eight days upon the high ſeas without ſailing, and at the end of eight days the captain of the privateer took a *French* prize, and, together with her and the *Salamander* endeavoured to come into ſome *Engliſh* port, but the wind not permitting, he carried them into *Liſbon*: that the *Salamander* remains there for the benefit of thoſe to whom ſhe belongs;
* P. 75 * that the plaintiff is intereſted, exceeding the ſum inſured; that the ſhip was prevented from finiſhing her three months cruiſe by the capture, but that ſhe was a living ſhip at the end of three months: that *Liſbon* is a neutral port; that the maſter of the

privateer

privateer obtained a decree in the court of Admiralty at *Gibraltar*, that the ſhip ſhould be reſtored to the owners, on payment of one third part for ſalvage.

Lord Chief Juſtice *Lee*, after two arguments, delivered the unanimous opinion of the whole court: The queſtion is, whether the capture of this ſhip, which was never carried *infra præſidia hoſtis* before ſhe was retaken, and upon the matter as found by the verdict, ſhall be conſidered as a total loſs, ſo as to entitle the inſured to recover the whole ſum inſured. And although by the civil law it may not perhaps be adjudged a total loſs, yet the rules of that law are not to govern us, but we muſt give our judgment, according to the common law of *England*, and upon this agreement between the parties, whoſe intention appears, and muſt guide us. By the civil law, there muſt be a total loſs to entitle the aſſured to recover, but the policy in this caſe extends to captures and other accidents. The meaning of the parties here is plain; the inſured paid his premium in conſideration of the inſurer's undertaking, that the *Salamander* ſhould cruiſe ſafely during three months; the jury have found that ſhe was diſabled from proſecuting her cruiſe for three months. We are all of opinion for the plaintiff, and that this is not an average, but a total loſs to the inſured: the inſurance is to be underſtood for the voyage of three months, and in common ſenſe it cannot be otherwiſe; ſo that as ſoon as the voyage is broken or interrupted, it is at an end. Safety during the three months is what is meant; but it appears that the ſhip was taken and detained within that time, and that the plaintiff was hindered in his cruiſe; and this, by our law, is a total loſs to the plaintiff. I have avoided ſaying any thing whether this was a prize or not, as being never carried *infra præſidia hoſtis*, becauſe we are all of opinion, that this is a total loſs. Judgment for the plaintiff.

In the caſe of *Spencer* v. *Franco*, the plaintiff had cauſed himſelf to be inſured on the *Prince Fredrick*, from *Vera Cruz* to *London*, *intereſt or no intereſt*, free of average, and without benefit of ſalvage. The ſhip was afterwards ſeized by order of the viceroy of *Mexico*, and the *Spaniards* turned her into a man of war, called the *Saint Philip*, and ſent her as commodore, with a ſquadron of *Spaniſh* men of war, to the *Havannah*, they having firſt taken out the *South Sea* company's arms, and made ſeveral alterations in her, and there was a war between *England* and *Spain*, and *Gibraltar* was actually beſieged by the *Spaniards*. The defendants proved the ſigning of preliminary articles of peace before the ſeizure of the ſhip, and therefore inſiſted, that this ſeizure did not alter the property, and conſequently the defendants were not liable: for if the property was not altered, this inſurance made by the plaintiff, who had no intereſt, cannot bind, as nothing comes within the policy but

Spencer v. Franco. co. Lord Hardwicke. Dec. 1736 Lex Merc. red. 4th. edit. p. 316.

* P. 76

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but a total loſs: and though there be thoſe general words in the policy, *reſtraint, or detainment of princes*, Lord Chief Juſtice *Hardwicke* declared, that a war might begin without an actual declaration or proclamation, as in this caſe, by laying ſiege to *Gibraltar*, a garriſon town; that as a war may begin by hoſtilities only, ſo it may end by a ceſſation of arms; and theſe preliminary articles being ſigned before the ſeizure of the ſhip, and there being a ceſſation of arms, he thought the ſhip being taken afterwards, not to be a taking by enemies, unleſs the jury took the captain to begin from the time the *South Sea* arms were ſeized, which was before the articles: that ſuppoſing the ſhip not taken by enemies, whether his detention for near the ſpace of a year was, in this ſort of policies, *viz. intereſt or no intereſt*, a detention within the policy; or whether in ſuch policies the inſurers are ever liable, but in caſe of a total loſs; and if ſo, this ſhip being afterwards reſtored, then he directed the jury to find for the defendants, which they accordingly did.

Dean v. Dicker. 2 Stra. 1250.

In another caſe, the inſurance was on goods by the *Durſley* galley, *intereſt or no intereſt*, at and from *Jamaica* to *Briſtol*. In her paſſage ſhe was taken by a *Spaniſh* privateer, and carried into *Mores*, a port in *Spain*, kept eight days, and then cut out by an *Engliſh* ſhip. The plaintiff inſiſted, that this inſurance, though on goods, was to be conſidered as a wager on the bottom of the ſhip; and therefore brought his action for a total loſs. The defendant ſaid, that by the ſtat. of 13 *Geo.* 2 *c.* 4. the ſhip is to be reſtored to the owners upon paying ſalvage, and conſequently this is only an average loſs; and the

* P. 77

* plaintiff can only recover upon a total one. Lord Chief Juſtice *Lee* held, that the plaintiff ought to recover: for this is a wager upon a total loſs in the voyage, and here has happened one; for being carried into port and detained eight days makes one. Where the policy is, "*intereſt or no intereſt*," the proviſions of the act in caſes of valued policies cannot take place. The act does not declare that the property is not gone by ſuch a capture, but only provides for reſtoring the ſhip to whom it did, and ſhall be proved to have belonged. He ſaid, it might be otherwiſe, where the ſhip was re-captured, before it was carried *infra præſidia*, or in caſe of goods actually on board, and upon a valued policy.

Whitehead. v. Bance. B. R. Mich. 1749.

An inſurance was made on the *Diſpatch* galley, *intereſt or no intereſt*, free of average, *&c.* from *Jamaica* to *Hull*. In her voyage ſhe was taken by a *French* privateer, and carried to *Hamburgh*, and after being twelve days in the hands of the enemy, ſhe was retaken by an *Engliſh* ſhip, and brought to *London*; where ſhe was adjudged to be reſtored to the owner, paying ſalvage. The owner ſold the ſhip, and paid the ſalvage. An action being brought on the policy, it was held to be a loſs of the voyage; and a verdict was given accordingly.

Theſe

Theſe caſes have been laid before the reader, without any comments except ſuch as have occurred from time to time to Lord *Mansfield*, as he has had occaſion to mention them; and it was the leſs neceſſary to obſerve upon each particular caſe, as one general obſervation is applicable to all, namely, that they were not policies upon *real intereſt*. Let it ſuffice then to repeat, that, at this day, in caſes of capture, the underwriter is immediately reſponſible to the inſured. But if the ſhip be recovered before a demand for indemnity, the inſurer is only liable for the amount of the loſs actually ſuſtained at the time of the demand: or if the ſhip be reſtored at any time ſubſequent to the payment by the underwriter, he ſhall then ſtand in the place of the inſured, and receive all the benefits and advantages reſulting from ſuch reſtitution. All theſe regulations certainly have their foundation in the great principles of equity and juſtice; an obſervation which muſt be obvious to every one who recollects, that a policy of inſurance is nothing more than a contract of indemnity.

* Having thus endeavoured to explain the nature of captures by an enemy, as far as they affect the ſubſtance of inſurances, I proceed now to treat of loſſes ariſing from another ſpecies of capture, namely, by detention; a part of our enquiry which will not demand a long or tedious diſcuſſion. The underwriter, by the expreſs terms of his contract, is anſwerable for all loſs or damage ariſing to the inſured, "*by the arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality whatſoever.*" * P. 78

The only queſtion then is, what ſhall be conſidered as ſuch detention: And indeed the words uſed are ſo large and comprehenſive, as hardly to admit of a doubt even upon that head. The learned *Roccus* is of opinion "*ut ſi merces captæ a poteſtate, ſeu judice juſtitiam adminiſtrante in illo loco, aut a populo, aut ab alia quacunque perſona per vim, abſque pretii ſolutione, tenentur aſſecuratores ſolvere æſtimationem dominis mercium, facta prius per dominos mercium ceſſione ad beneficium aſſecuratorum pro recuperandis illis mercibus, vel pretio ipſorum a capientibus,*" In another place he ſays, "*Regis & principis factum connumeratur inter caſus fortuitos; ideo ſi rex et princeps retineant navem oneratem frumento ex cauſa penuriæ, quapropter navis non potuerit frumenta aſportare ad locum deſtinatum tenentur aſſecuratores.*" Roccus de aſſec Not. 54. Not. 65.

Malyne lays down the law to be, that the inſurers are liable for all loſſes by arreſts, detainments, &c. happening both in time of war and peace, committed by the public authority of princes. And Lord *Mansfield* has ſaid, that the inſured may abandon in caſe merely of an arreſt or embargo by a prince; not an enemy; and conſequently ſuch an arreſt is a loſs within the meaning of the word *detention*. Malyne 116. 2 Burr. 696.

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An embargo is an arreſt laid on ſhips or merchandize by publick authority, or a prohibition of ſtate commonly iſſued to prevent foreign ſhips from putting to ſea in time of war, and ſometimes alſo to exclude them from entering our ports. This term has alſo a more extenſive ſignification, for ſhips are frequently detained to ſerve a prince in an expedition, and for this end have their loading taken out, without any regard to the colours they bear, or the princes to whoſe ſubjects they be-

Lex Merc. red. 4th edit. 260.

* P. 79

* long. The legality of ſuch a meaſure has been doubted by ſome, but it is certainly conformable to the law of nations, for a Prince in diſtreſs to make uſe of whatever veſſels he finds in his ports, that may contribute to the ſucceſs of his enterpriſe. Embargoes laid on ſhipping in the ports of *Great Britain*, by royal proclamation, *in time of war*, are ſtrictly legal, and will be equally binding, as an act of parliment, becauſe ſuch a proclamation is founded on a prior law, namely, that the king may prohibit any of his ſubjects from leaving the realm. But in times of peace the power of the king of *Great Britain* to lay ſuch reſtraints is doubtful; and therefore where ſuch a proclamation iſſued in the year 1766, againſt the words of a ſtatute then in force, although abſolutely neceſſary for the prevention of a dearth in this country, it was thought prudent to procure an act of the legiſlature to indemnify thoſe who adviſed, or who acted under, that proclamation.

Grot. de jure belli, lib. 2. cap. 2. ſ. 10. 1. Black. Com. 270.

7 Geo. 3. c. 7.

In caſe of detention by a foreign power, which in time of war may have ſeized a neutral ſhip at ſea, and carried it into port to be ſearched for enemy's property, all the charges conſequent thereon muſt be borne by the underwriter: and whatever coſts may ariſe from an improper detention, muſt always fall upon them.

1 Magens 67.

This was held by *Willes*, *Aſhurſt*, and *Buller*, juſtices, in the abſence of Lord *Mansfield*, in a caſe, the circumſtances of which are as follows; it was an inſurance on the ſhip *Thetis*, a neutral ſhip; and upon the trial, a ſpecial caſe was reſerved for the opinion of the court, ſtating: that the plaintiffs were *Tuſcan* ſubjects, reſident at *Leghorn*, ſole owners of the ſhip *Thetis*, which ſailed from *Leghorn*, and was captured by a *Spaniſh* ſhip off the coaſt of *Barbary*, with neutral goods on board, conſigned to *London*. She was condemned as prize in the court of Vice Admiralty in *Spain*, which Sentence was reverſed; but upon another appeal to a ſuperior court, the latter ſentence was alſo reverſed, and the former confirmed. The grounds of condemnation were two: 1ſt. That the ſhip *Thetis* refuſed to be ſearched, and reſiſted with force, having fired at the *Spaniſh* ſhip: 2dly. That ſhe had no charter party on board. The captain of the *Thetis* anſwered theſe two

Salucci v. Johnſon. BR Hil. 25 Geo 3.

* P. 80.

* grounds: 1ſt. That he reſiſted and fired, becauſe the *Spaniard* hailed him under falſe colours: 2dly. That he had taken the goods

goods on board by the piece, and had not freighted his ſhip to any individual; in which caſe a manifeſto was ſufficient without a charter party. The ſentence of the laſt court of appeal, although it condemns, admits the neutrality, for it ſtates the veſſel to be "*a Tuſcan ſhip.*" The laſt ground relative to the charter party was not inſiſted upon. Upon the other, the three learned judges above mentioned were of opinion, that a neutral ſhip is not obliged to ſtop to be ſearched; that the captain had not been guilty of barratry; that the ſearcher ſtops a neutral ſhip at his peril; that this was to be conſidered as a caſe of improper detention, and conſequently that the plaintiff upon this policy was entitled to recover.

But though an underwriter is liable for all damage ariſing to the owner of the ſhip or goods from the reſtraint or detention of princes yet that rule ſhall not be extended to caſes where the inſured ſhall navigate againſt the laws of thoſe countries, in the ports of which he may chance to be detained, or to caſes where there ſhall be a ſeizure for non-payment of cuſtoms. This was ſo ruled by Lord Commiſſioner *Hutchins* in Chancery, in the year 1690: and the reaſon of it is obvious, becauſe there is a groſs fraud on the part of the owner of the property inſured; and no man ſhall take advantage of his own miſconduct. If indeed any of thoſe acts were committed by the maſter of the ſhip, without the knowledge of the inſured, the underwriter would be liable, if not for loſſes by detention, at leaſt for a loſs by the barratry of the maſter, to which ſuch conduct would moſt certainly amount. 2 Vern. 176. Vide the next chapter.

It appears to have been a queſtion, whether the inſurers were liable for the payment of damage ariſing by the detention or ſeizure of ſhips by the government of the country, to which they belong. I have only been able to find one common law caſe where this point was expreſsly in iſſue, and that was not decided.

In evidence upon the trial in an action upon a policy of inſurance, the caſe appeared to be, that the inſurer agreed to * inſure the ſhip from her arrival at——in *Jamaica* during her voyage to *London*; and an embargo was laid upon the ſhip by the government; who afterwards ſeized the ſhip, converted her into a fireſhip, and offered to pay the owners. The queſtion was, if this would excuſe the inſurers? *Holt*, Chief Juſtice, ſeemed to incline, that it would not, and that this was within the words, *detention of princes, &c.* but he gave no abſolute opinion, the cauſe having been referred to three of the jury. Green v. Young. 2 Ld. Raym 840. 2 Salk. 444. * P. 81.

The very general words made uſe of in policies go to ſupport the idea entertained by Lord *Holt*. and although I have found no caſe where this point was expreſsly conſidered, yet it ſeems to have been taken as ſettled in many caſes, which have

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come before the court. One instance immediately occurs, in the case of *Robertson* v. *Ewer*, which was cited in a former chapter. There an embargo had been laid by Lord *Hood* on all shipping at *Barbadoes*; and it was never doubted that the insurer was liable for any loss which might have been sustained by such detention, provided the loss had happened to any of the property specifically insured. It is true, that it is declared by the ordinances of *France*, "that if any ship be stopped by our "orders in any of the ports of our kingdom *before the voyage* "*be begun*, the insured shall not, on account of this detention, "abandon or cede their effects to the insurers." A similar regulation is to be found in *Bilboa*, by which it is ordained, "that if any ship or ships insured, with or without goods, shall "be detained by his majesty's order, in the ports of these "kingdoms of *Spain*, *before the commencement of the voyage she* "*is bound on*, it shall be judged that no cession can be made of "them, but rather the insurance in such case ought to be held "null." If these ordinances, when they use the words, "commencement of the voyage," mean commencement of the risk insured, they agree with the laws of *England*; because the underwriter can never be answerable for any thing happening before that period: but when the risk insured is "at and from," if the ship be detained by the order of the sovereign before her departure for the voyage, but after the risk commenced, the insurer by our law is liable for the damage occasioned by such detention, as the words in the policy * do in themselves import no restriction to restraints and embargoes by foreign potentates only.

Vide ante p. 54.

2 Magens 176.

2 Magens 417.

* P. 82

By what has been said it appears, that before the insured can recover against the underwriter in cases of detention, he must first abandon to the insurers his right, and whatever claims he may have to the goods insured. This point will be fully treated of in the chapter of abandonment. It will be sufficient here to remark, that in most of the countries on the continent, the time for abandonment in such cases is fixed to a limited period after the event has happened. In *Bilboa* and *France* the cession must be made within six months, if the loss has happened in any part of *Europe*; and within a year, if in a more distant country. A similar regulation as to time is established by the ordinances of *Middleburgh* in *Zealand*. By the law of *England*, there is no positive rule on this subject, consequently an insured has a right to abandon immediately upon hearing of the detention. But it should seem, that in order to prevent the underwriters from being harrassed, the insured ought to make his election, whether he will abandon or not, within a reasonable time; and what that shall be, must in general depend upon the circumstances of the case.

2 Magens 175. 416.

2 Magens 23.

See the case of Mitchell v. Edie. post. ch. 9. where this point has been considered and settled.

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*CHAPTER THE FIFTH.

* P. 83

Of Loſſes by the Barratry of the Maſter or Mariners.

IT does not ſeem to have been any where preciſely aſcertained, from what ſource the term *barratry* has been derived.

Indeed the derivations of barratry have rather tended to confound, than to throw any light upon the ſubject: for its root has been ſo frequently altered, according to the caprice of the particular writer, that it is impoſſible to decide which is the true one The *Engliſh*, however, moſt probably have taken it from the *French*, *barrateur*, which is to be traced to the *Italians:* but where the latter found this word is a thing by no means clear.

Whatever the derivation may be, the word ſeems to have been originally introduced into commercial affairs by the *Italians*, who were the firſt great traders of the modern world. In the *Italian* dictionary, the word *barratrare* means to cheat; and whatſoever is done by the maſter amounting to a cheat, a fraud, a cozening, or a trick, is barratry in him. *Poſſlethwaite*, in his dictionary of trade and commerce, defines *barratry* thus: "barratry is committed when the maſter of the ſhip, or the "mariners cheat the owners, or inſurers, whether it be by "running away with the ſhip, ſinking her, deſerting her, or "embezzling the cargo." In another place, the ſame author obſerves, "one ſpecies of barratry in a marine ſenſe is when "the maſter of a ſhip defrauds the owners or inſurers, by car-"rying a ſhip a courſe different from their orders." Theſe definitions are ſo very comprehenſive, that they ſeem to take in every caſe of barratry, known to the law of *England*, as far as we can collect the principles from the ſeveral caſes that have been decided. From a review of thoſe caſes, and they are but few, it appears, that any act of the maſter, or of the mariners, which is of a criminal nature, or which is groſly negligent, tending to their own benefit, to the prejudice of the owners of the ſhip, without their conſent or privity, is barratry.

Cowp. 154.

1 vol. p. 214

1 vol. 136

* P. 84

1 Stra. 581. 2 Stra. 1173. Cowp. 1553. 1 Term. Rep 323.

It is not neceſſary, in order to entitle the inſured to recover for barratry, that the loſs ſhould happen *in the act of barratry*; that is, it is immaterial, whether it take place *during* the *fraudulent* voyage, or *after* the ſhip has returned to the regular courſe; for the moment the ſhip is carried from its right track with an evil intent, barratry is committed.

Cowp. 1553

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But the loſs, in conſequence of the act of barratry, muſt happen *during the voyage inſured*, and within the time limited by the policy, otherwiſe the underwriters are diſcharged. Thus if the captain be guilty of barratry by ſmuggling, and the ſhip afterwards arrive at the port of deſtination, and *be there moored at anchor twenty four hours in good ſafety*; the underwriters are not liable, if, after this, ſhe ſhould be ſeized for that act of ſmuggling.

Lockyer. v. Offley. 1 Term Rep. p. 252. Vide ante ch. 2. p. 31.

From the above deſcriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private intereſt, no barratry has been committed. I have ſaid, that to conſtitute barratry, it muſt be without the knowledge or conſent of the owners; becauſe nothing can be ſo clear as this, that no man can complain of an act done, to which he himſelf is a party. But it is material to conſider, in what ſenſe the word owner is to be underſtood, in this definition. It has been argued, that if *A.* be the owner of a ſhip, and let it out to *B.* as freighter, who inſures it for the voyage; and if the deviation be with the knowledge of *A.* though unknown to *B.* the inſurer is diſcharged. But the court over-ruled that argument, and ſaid, that in order to diſcharge the inſurer from the loſs by barratry, it muſt appear, that the act done was by the conſent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the perſon inſured.

Cowper 154.

These principles being advanced, it will now be ſufficient to ſhew that they are ſupported and eſtabliſhed by the caſes which have been decided. But before they are quoted, it will be proper to obſerve, that by the poſitive regulations of *Middleburgh*, *Amſterdam*, *Hamburgh*, and other countries in *Europe*, the underwriters are univerſally held to be anſwerable for loſſes ariſing by the barratry of the maſter or mariners. By the ordinances of *Rotterdam*, the owners of ſhips are prohibited from making inſurances againſt the barratry of the maſters, whom they themſelves ſhall appoint; but they may inſure againſt their neglect, and alſo againſt the villainy of the ſailors, and of ſuch maſters, as may happen to ſucceed to the command of the ſhip in foreign parts, without the knowledge of the owners, on account of the deceaſe or abſence of the maſter originally appointed. No ſuch rule prevails in the law of *England*; but the inſurer undertakes generally and by expreſs words inſerted in the policy, to indemnify the owner of the ſhip or cargo againſt all loſſes which he may happen to ſuſtain by the barratry of the maſter or mariners, even though the maſter ſhould have been appointed by himſelf: a circumſtance which is rather ſingular, for the inſurer to undertake for the conduct of a man whom he can neither appoint nor diſmiſs.

* P. 85

2 Magens 73. 130. 215

2 Magens 89.

In

In an action upon the case on a policy of insurance, on the ship *Riga Merchant*, "at and from *Port Mahon*, to *London*, "against the barratry of the master (among other things), and "all other damages, dangers, and misfortunes which should happen to the prejudice and damage of the said ship," *by the "fraud and negligence"* of the master. The plaintiff had judgment in the court of Common Pleas. The defendant brought a writ of error, and it was contended by his counsel, that the words, "*fraud and negligence*," used in the declaration, were more general than the words *barratry*; and that the breach should have been express, that the ship was lost by the barratry of the master; that if the word *barratry* do import fraud, yet it does not import neglect; and the fact here alledged is, that the ship was lost by the fraud and negligence of the master.

Knight v. Cambridge. 2 Ld. Raym. 12. 1 Stra. 581.

But the court were unanimously of opinion, that there was no occasion to aver the fact in the very words of the policy; but that if the fact alledged came within the meaning of the words in the policy, it would be sufficient. Barratry imports * fraud; and he that commits a fraud, may properly be said to be guilty of a neglect, *viz.* of his duty. Barratry of a master is not to be confined to the master's running away with the ship; but it extends to any fraud of the master. The end of insuring is to be safe in all events; and, it would be very prejudicial if we were to make loopholes to get out of these policies. The judgment was affirmed.

* P. 86

In another case, the ship the *Gothick Lyon* being advertised to go to *Marseilles*, goods were shipped on board her on behalf of the plaintiff; and a bill of lading was signed by the master, whereby he undertook to go straight to *Marseilles*, and the defendant underwrote a policy from *Falmouth* (where the goods were taken in,) to *Marseilles*. Before the ship departed from the port of *London*, another advertisement was published for goods to *Genoa*, *Leghorn*, and *Naples*; and the plaintiff's agent was told, that it was intended to go to those ports first, and then come back to *Marseilles*; but he insisted that his bargain was to go directly to *Marseilles*; and, he would not consent to let her pass by *Marseilles*, or alter his insurance.

Stamma v. Brown. 2 Stra. 1173.

The ship, however, did pass by *Marseilles*; and after delivering her cargo at the other ports, set out on her return for *Marseilles* with the plaintiff's goods; but in a voyage thither, was blown up in an engagement with a *Spanish* ship. In an action upon the policy, the breach assigned was a loss by the barratry of the master.

Lord Chief Justice *Lee* told the jury, that this voyage, being against the express agreement to go first to *Marseilles*, seemed to be more than a common deviation, as it was a formed de-

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ſign to deceive the contractor. He compared it to the caſe of ſailing out of port without paying the duties, whereby the ſhip was ſubjected to forfeiture, and which has been held to be barratry.

The jury ſtaid out ſome time, and upon their return, aſked the Chief Juſtice, whether, if the maſter were to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places firſt for the benefit of his owners, that would be barratry. And the Chief Juſtice having anſwered, No, they found for the defendant.

* P. 87 * A new trial being moved for, the caſe was argued; and all the judges of the *King*'s *Bench* were of opinion, that the verdict was right: for the maſter has acted conſiſtent with his duty to his owners; and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refuſed to ſhip them, or have altered the inſurance. The court alſo held, that to conſtitute barratry, there muſt be ſomething of a criminal nature, as well as a breach of contract; and, that as the breach was aſſigned upon the barratry only, it was not ſupported by the evidence. So the defendant had judgment.

Elton. v. Bogden. 2 Stra. 1264. In Sir *John Strange's* reports we find another caſe upon the ſubject of barratry. The ſhip *Mediterranean* went to ſea in the merchants' ſervice, having alſo a letter of marque; and was inſured by the defendant, being bound from *Briſtol* to *Newfoundland*. In her voyage ſhe took a prize, returned with it to *Briſtol*, and received back a proportionable part of the premium. Another policy was then made, and the ſhip ſet out, the captain having firſt received expreſs orders from the owners that if he took another prize, he ſhould put ſome hands on board ſuch prize, and ſend her to *Briſtol*; but that the ſhip in queſtion ſhould proceed with the merchant's goods. Another prize was taken in the due courſe of the voyage; and the captain gave orders to ſome of the crew to carry the prize to *Briſtol*, and deſigned to go on to *Newfoundland*: but the crew oppoſed him, and inſiſted that he ſhould go back, though he acquainted them with his orders; upon which he was forced to ſubmit, and, on his return, his own ſhip was captured, but the prize got in ſafe.

In an action againſt the inſurers, it was inſiſted, that this was ſuch a deviation, as diſcharged them. But Lord Chief Juſtice *Lee*, and the jury held, that this deviation was excuſed by the force upon the maſter, which he could not reſiſt; and therefore fell within the plea of neceſſity, which had always been allowed. The plaintiff's counſel thought it was barratry; but the chief Juſtice was of opinion, that it did not amount to that, as the ſhip was not run away with, in order to defraud the owners. But as this was a caſe not of wilful deviation, but of a deviation through

through neceſſity; the inſurers were held to be anſwerable, and the plaintiff had a verdict for the ſum inſured.

* Theſe are all the common law caſes, which are to be found on the ſubject of barratry, during a long ſeries of years, *viz.* from the firſt origin of inſurances, till the year 1774, when a caſe aroſe, in which all the doctrine on this head was fully conſidered. * P. 88

It was an action on a policy of inſurance upon goods on board the *Thomas* and *Mathew*, from *London* to *Seville*. The policy was made in the common form, with liberty to touch at any ports or places, &c. The loſs was aſſigned different ways in the declaration: Firſt, by ſtorms and perils of the ſea, in conſequence of which, the ſhip was obliged to go to *Dartmouth* to be repaired; and, that afterwards a further loſs happened by ſtorms, &c. Secondly, that it happened by ſtorms and perils of the ſeas in the voyage generally; and Thirdly, by the *barratry* of the maſter. Vallejo and Another v. Wheeler. Cowp. Rep. 143.

The cauſe was tried before Mr. Juſtice *Aſhhurſt* at *Guildhall* at the ſittings after *Eaſter* term, 1774, by a ſpecial jury. On the trial it was proved, that this ſhip was put up as a general ſhip from *London* to *Seville*; and was let to freight to one *Darwin*, to whom ſhe was chartered by *Brown* the captain: that it is the courſe of veſſels going on this voyage, to ſtop at ſome port in the weſt of *Cornwall*, to take in proviſions: that this ſhip having taken her cargo on board, ſailed from *London* to the *Downs*: that while ſhe lay there, all the other ſhips bound to the weſtward, bore away; but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was *out of the courſe of the voyage*: that the captain went there for his own convenience, to take in brandy and wine on his *own account*; after which he intended to proceed to *Cornwall*: that the night after the ſhip quitted *Guernſey*, ſhe ſprung a leak, which obliged her to put into *Dartmouth*. When ſhe was refitted, ſhe ſet ſail again and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop to take in proviſions; but in her way ſhe received further damage, and on her arrival there, was totally incapable of proceeding on the voyage, and the goods were much damaged. It was attempted on the part of the defendant to prove, that one *Willes* was the owner of the ſhip: that the voyage to *Guernſey* was on his account; and, that the goods, taken on board there, were his property: but this evidence went little further than information and belief, except that it was proved, that when the ſhip arrived at *Helford*, the wine was delivered to him in his cellar. The learned judge directed the jury, that if the going to *Guernſey* was *without the knowledge of Darwin*, it was barratry, and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: that if they ſhould be of opinion, that it was without the knowledge of * P. 89

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Darwin he desired them to say, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and said, they thought the going to *Guernsey* was without the knowledge of *Darwin*, whom they looked upon to be the true owner; but they were of opinion, it was with the knowledge of *Willes*.

A motion was afterwards made for a new trial; and the case, being a question of great consequence to the mercantile world, was twice argued at the bar; after which the judges were unanimously of opinion, that the plaintiff was entitled to recover, but they delivered the reasons of their judgment *seriatim*.

Lord *Mansfield*.—The ground of the motion for a new trial in this case is, that under the circumstances, as they were given in evidence to the jury, the carrying the ship to *Guernsey*, was merely a *deviation*, but not *barratry*. Much more stress was laid at the trial, than in either of the arguments, upon this fact; namely, that the deviation being with the knowledge of *Willes*, the owner (though not owner *pro hac vice*) of the ship, it could never be barratry; and therefore, the jury were pressed to say, whether it was with the consent of *Willes* or not; and they said, it was. To be sure nothing is so clear, as that if the owner of a ship insure, and bring an action on the policy, he can never set up as a crime a thing done by his own direction or consent. It was therefore a material fact to proceed upon, if *Willes* had had any thing to do in the case; but he had not. It appeared to me, that the nature of barratry had not been judiciously considered, or defined in *England* with accuracy. In all mercantile transactions, the great object should be certainty: and therefore, it is of more consequence that the rule should be certain, than whether the rule is established one
• P. 90 * way or the other; because speculators in trade then know upon what ground to proceed. His Lordship then stated the three cases above quoted from *Strange*; and after giving a definition of the word barratry, he proceeded thus: in this case, the underwriter has insured against all barratry of the master; and we are not now in a case where the owner or freighter is privy to it: if we were, it is evident, that no man can complain of an act, to which he is himself a party. In this case, all relative, to *Willes* may be laid out of it: he is originally the owner; but not the insurer here. *Darwin* was the freighter of the ship, and the goods that were on board were his: if any fraud be committed on the owner, it is committed on *Darwin*. The question then is, what is the ground of complaint against the master? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* trusts he will set out immediately, instead of which the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to *Seville*: that is a cheat and a fraud on *Darwin*, who thought he would set out directly; and whether

whether the loſs happened in the act of barratry, that is *during* the fraudulent voyage, or *after*, is immaterial, becauſe the voyage is equally altered, even though there is no other iniquitous intent. But in the preſent caſe, there is a great deal of reaſon to ſay that the loſs ſuſtained, was in conſequence of the alteration of the voyage. The moment the ſhip was carried from its right courſe, it was barratry; and here the loſs happened immediately upon the alteration. Suppoſe the ſhip had been loſt *afterwards*, what would have been the caſe of the inſured if he were not ſecured againſt the barratry of the maſter? He would have loſt his inſurance by the fraud of the maſter; for it was clearly a deviation, and the inſured cannot come upon the underwriters for a loſs, in conſequence of a deviation. Therefore, I am clearly of opinion, that this ſmuggling voyage was barratry in the maſter.

Mr. Juſtice *Aſton*.—I wonder that there ſhould remain a doubt at this day, what is meant by barratry in the maſter. In different ordinances different terms are uſed; but they all have the ſame meaning. In one of the ordinances of *Stockholm*, it is called "knavery of the maſter or mariners;" and the facts ſtated here, clearly fall within that deſcription. Where it is a deviation with the conſent of the *owner of the veſſel*, and the maſter is not acting for his own private intereſt; in ſuch caſe it is nothing but a deviation with the conſent of the owner, and the underwriter is excuſed. In this caſe, the hulk of the ſhip belonged to *Willes*; but he had nothing to do with it, having chartered it to *Darwin*: the jury therefore did right in conſidering *Darwin* the owner *pro hâc vice*. Having conſidered him in that light, the conduct of the maſter was clearly barratry; for he was acting for his own benefit, without intending any good to his owner, and without his conſent and privity. Nobody knows when the firſt commencement of the injury happened; but moſt probably, on the return of the ſhip to *Dartmouth* from *Guernſey*, where he had been for the purpoſe of ſmuggling. Therefore, I am clearly of opinion, that this change of the voyage for an iniquitous purpoſe, was barratry; which is not confined to the running away with the ſhip, but comprehends every ſpecies of fraud, knavery or criminal conduct in the maſter, by which the owners or freighters are injured. *P. 91

Mr. Juſtice *Willes*. The only doubt I had in this caſe was, at what time the loſs happened: and I think it may reaſonably be ſaid to have happened in conſequence of the ſmuggling voyage: for if the ſhip had proceeded on her firſt intended courſe, ſhe would have eſcaped the ſtorm. Though this was a deviation, yet it is a fair and juſt rebutter to ſay, that it was barratry in the maſter, which is a peril inſured againſt by the policy.

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Mr. Juſtice *Aſhhurſt* continued of the ſame opinion, which he held at the trial; and the rule for a new trial was diſcharged by the unanimous opinion of the whole court.

Robertſon v. Ewer. Vide the laſt chapter.

In another caſe, which has already been twice cited for another purpoſe, Mr. Juſtice *Buller*, who tried that cauſe, ſeemed to think, that the breach of an embargo was an act of barratry in the maſter.

In the caſe of *Vallejo*, v. *Wheeler*, it was ſettled, that the freighter of the ſhip is to be conſidered as the owner for that voyage: and it ſeems alſo clearly ſettled by the ſame caſe, that * if an act be committed without the conſent of the owners of the ſhip, that cannot be barratry. It was, however, in a very late caſe, inſiſted upon, that an act of the captain, without the conſent of the owners of the goods, who were the inſured, *though with the conſent of the owners of the ſhip*, was barratry, ſo as to charge the underwriters. This doctrine, however, was over-ruled; and could not have been admitted without overturning all former deciſions upon the ſubject. Barratry implies ſomething contrary to the duty of maſter and mariners, *in the relation in which they ſtand to the owners of the ſhip*; and although they may make themſelves liable to the owners of the goods for miſconduct, yet not for *barratry*, which can be committed againſt the owners of the ſhip, and them only.

* P. 92.

Nutt and others, aſſignees of Hague v. Bourdieu. 1 Term Rep. 223. for Trin. 26 Geo. 3.

The caſe, in which this point was ſettled, was an action on a policy of inſurance, made by *Hague* before he became a bankrupt, *on goods* laden in the ſhip *Rachette* (otherwiſe the *Bellona*) for a voyage from *London* to *Rochelle*, ſubſcribed by the defendant for 120*l.* at 1*l.* 10*s.* *per cent.* premium. The cauſe was tried at *Guildhall* before Mr. Juſtice *Buller*, when a verdict was found for the plaintiff, ſubject to the opinion of the court, upon the following caſe: That the bankrupt ſhipped on board the veſſel in queſtion goods to the amount of 1800*l.* for *Rochelle*. That the captain, *by the inſtigation and direction of Meſſrs. Le Grands, the owners of the ſhip, went with the ſhip and cargo to Bourdeaux, inſtead of Rochelle*, where the cargo was ſold by the agent of *Le Grands*. That a petition was preſented by the plaintiffs to the lieutenant general of the Admiralty of *Guienne*, ſtating the whole of the tranſaction between the bankrupt and the owners and captain; that in order to procure a landing at *Bourdeaux*, their original deſtination being to *Rochelle*, falſe bills of loading were made out by the captain, at the inſtigation of *Le Grand:* the petition concluded with a prayer for relief. In conſequence of this petition, a decree was paſſed, declaring *René Guiné* (captain) *guilty of the crime of barratry of the maſter*, for having ſigned falſe bills of lading, *&c.* for reparation whereof, it ſentenced him to perpetual ſervice in the gallies. It alſo declared *Dominique Le Grand* guilty and convicted *of having been an inſti-*

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gator and accomplice of the ſaid barratry of the maſter, and adjudged him to five years ſervitude in the gallies: and alſo decreed, that the ſaid *Rene Guiné* and *Le Grand* ſhould pay to the plaintiffs the amount of their loſs, and all charges and coſts. The queſtion on this caſe is, whether the plaintiffs were entitled to recover againſt the inſurers. After the firſt argument,

* P. 93.

Lord *Mansfield* ſaid, that with regard to the ſentence which had been paſſed abroad, and which had declared the maſter and owner to have been guilty of barratry, it was entirely out of the queſtion. That though it was a moſt righteous judgment, yet that it was no part of the conſideration of the court there, what was meant by barratry in an *Engliſh* policy. The queſtion was left entirely open. That their idea of barratry was manifeſtly different from the conſtruction put upon that word in our own courts, for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry, which had ever been laid down in an *Engliſh* court of juſtice.

A few days afterwards the court declared, that they had not the ſmalleſt doubt as to the preſent queſtion, and therefore thought it very unneceſſary to hear a ſecond argument.

Lord *Mansfield* delivered the opinion of the court.

All queſtions upon mercantile tranſactions, but more particularly upon policies of inſurance, are extremely important, and ought to be ſettled. The general queſtion here is on the conſtruction of the word *barratry* in a policy of inſurance. It is ſomewhat extraordinary that it ſhould have crept into inſurances, and ſtill more, that it ſhould have continued in them ſo long: for the underwriter inſures the conduct of the captain, whom he does not appoint, and cannot diſmiſs, to the owner, who can do either. The point to be conſidered is, whether barratry, in the ſenſe in wh ch it is uſed in our policies of inſurance, can be committed againſt any but the owners of the ſhip. It is clear, beyond contradiction, that it cannot; for barratry is ſomething contrary to the duty of the *maſter and mariners*, the very terms of which imply, that it muſt be in the relation in which they ſtand to the *owners of the ſhip*. The words uſed are *maſter* and *mariners*, which are very particular. *An owner cannot commit barratry.* * He may make himſelf liable by his *fraudulent conduct* to the owner of the goods, but not *as for barratry*. And, beſides, barratry cannot be committed againſt the owner, *with his conſent*: for though the owner may become liable for a civil loſs by the miſbehaviour of the captain, if he conſents, yet that is not *barratry*. Barratry muſt partake of ſomething criminal, and muſt be committed *againſt the owner* by the *maſter* or *mariners*.

* P. 94

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riners. In the case of *Vallejo* and *Wheeler*, the court took it for granted, that barratry could only be committed against the owner of the ship. The point is too clear to require any further discussion.

The *postea* was delivered to the defendant.

It is clear that if the owner be also the master of the ship, any act, which in another master would be construed barratry, cannot be so in him; because such doctrine would militate against one of the rules laid down in a former part of this chapter; namely, that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurers for a loss, occasioned by his own act. This rule has been extended in the Court of Chancery to a case, where such an owner and master, after mortgaging his ship, had committed barratry; and when the mortgagee brought an action at law against the insurer to recover damages for the loss which he had sustained by this act of barratry, the court, still considering the mortgagor as the owner, granted an injunction.

Lewin v. Suasso. Chancery, 15. Geo. 2. Postlethw. Dictionary, 1 vol. 147.

The facts of that case were these. The plaintiff in equity, having been sued at law upon a policy of insurance against the barratry of the master, which was also the loss assigned in the declaration, brought his Bill in Chancery to be relieved, and for an injunction. The voyage insured was from *London* to *Marseilles*, and from thence to some port in *Holland*. The master sailed with the ship to *Marseilles*, and then, instead of pursuing his voyage, sailed to the *West-Indies*, where he sold his ship, and died insolvent. The plaintiff by his bill suggested, that *Mathews*, the master, was also the owner of the ship: that he had, before the voyage, entered into a bottomry bond to the defendant for 200*l.* and afterwards, by a bill of sale, had

* P. 95

* assigned over his interest in the ship to the defendant, as a security for the 200*l.*: that *Mathews* was nevertheless, in equity, to be considered as owner of the ship, though in law the ownership and property would be looked upon to be in the defendant; and that the owner of a ship could not, either in law or equity, be guilty of a barratry concerning the ship; and therefore, he prayed an injunction, and that the policy might be delivered up. The matters of fact being confessed by the answer, an injunction was moved for on the principle, that a mortgagor is to be considered in equity as the owner of the thing mortgaged; and that *Mathews*, the master, being owner, could not be guilty of barratry.

Lord *Hardwicke*.—Barratry is an act of wrong done by the master against the ship and goods; and this being the case of a ship, the question will be, who is to be considered as the owner? Several cases might be put, where barratry may be assigned as the breach of an insurance; and bar-

barratry or not, is a queſtion properly determinable at law: but in this caſe it is not ſo, for courts of law will not conſider a mortgagor as having any right or intereſt in the thing mortgaged; and a man may frequently come into equity for relief in reſpect of a part only of his caſe. It might, indeed, be conſidered at law, whether what the maſter has done, whether he be owner or not, did not amount to a breach of contract as maſter, and ſo to a barratry: it may likewiſe be ſo conſidered in this court. But at law a defendant cannot read part of a plaintiff's anſwer to a bill filed againſt him here: the whole anſwer muſt be read, which has often been a reaſon for this court to interpoſe by injunction upon a plaint at law; and conſidering the mixed nature of this caſe, I think an injunction ought to be granted.

Even if the parties inſert in the policy the words *in any lawful trade*, if the captain commit barratry by ſmuggling, the underwriters are anſwerable. For otherwiſe the word *barratry* ſhould be ſtruck out of the policy; and moſt clearly the ſtipulation in the policy reſpecting the employment of the ſhip in a lawful trade, muſt mean, as was ſaid by Lord *Kenyon* in delivering the unanimous opinion of the Court, *the trade* on which ſhe is ſent by the owners. Havelock, v. Hancil upon Demurrer. 3. Term R. 277.

* Hitherto we have conſidered barratry only, as it affects the rights of the inſurer and inſured, which is certainly the material point of view in our preſent enquiry: but, before we come to the concluſion of this chapter, it will be proper to take notice of thoſe poſitive regulations, which exiſt in this and other countries, for the puniſhment of thoſe who are guilty of ſome of the more heinous acts of barratry. * P. 96

By the ordinances of *Middleburg*, *Rotterdam*, and *Hamburgh*, if any act of barratry be committed by the maſter, various degrees of puniſhment, ſometimes amounting even to death, are inflicted upon him, proportioned to the enormity of his guilt. 2 Magens 77. 112. 215.

We do not find that any puniſhment was expreſsly provided, by the law of *England*, for offences of this nature, till the reign of Queen *Anne*, at which time, as may be collected from the preamble of the ſtatute, the wilful caſting away, burning or deſtroying of ſhips by the maſter or mariners, was become very frequent.

To prevent theſe evils that ſtatute ordains, "that if any "captain, maſter, mariner, or other officer belonging to any "ſhip, ſhall wilfully caſt away, burn, or otherwiſe deſtroy "the ſhip unto which he belongeth, or procure the ſame to be "done to the prejudice of the owner or owners thereof, "or of any merchant or merchants that ſhall load goods "thereon, he ſhall ſuffer death as a felon." Anne, ſtat. 2. c. 9. ſ. 4

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Upon trial this act was found not to be ſufficiently extenſive: and therefore, by a ſubſequent ſtatute, it was declared, "that

4 Geo. 1. c. 12. ſ. 3.

"if any owner of, or captain, maſter, mariner, or other officer belonging to any ſhip, ſhall wilfully caſt away, burn or otherwiſe deſtroy the ſhip of which he is owner, or unto which he belongeth, or in any manner direct or procure the ſame to be done, to the prejudice of any perſon or perſons that ſhall underwrite any policy or policies of inſurance thereon, or of any merchant or merchants that ſhall load goods thereon, he ſhall ſuffer death,"

11 Geo. 1. c. 29. ſ. 6.

By a ſubſequent ſtatute it was afterwards enacted, "that if any owner of, or captain, maſter, officer or mariner belonging to any ſhip or veſſel, ſhall wilfully caſt away, burn, or otherwiſe deſtroy the ſhip or veſſel of which he is owner, or to which he belongeth; or in any wiſe direct or procure the ſame to be done, with intent or deſign to prejudice any perſon or perſons that hath underwrote, or ſhall underwrite any policy or policies of inſurance thereon, or of any merchant or merchants that ſhall load goods thereon, or of any owner or owners of ſuch ſhip or veſſel, the perſon or perſons offending therein, being thereof lawfully convicted, ſhall be deemed and adjudged a felon or felons, and ſhall ſuffer, as in caſes of felony, without benefit of clergy."

* P. 97

7th Section.

The following ſection directs, that if the offence be committed within the body of a county, the ſame ſhall be tried as all felonies are in the common law courts: but if upon the high ſeas, then to be tried agreeably to the directions of the 28th H. 8. c. 15.

Theſe are the only poſitive regulations, known to the law of *England*, for the puniſhment of thoſe who wilfully deſtroy ſhips to the prejudice of ſuch perſons as are intereſted in their preſervation.

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*CHAPTER THE SIXTH.

Of Partial Loſſes, and of Adjuſtment.

HAVING, in the preceding chapters, treated fully of the different kinds of loſſes, for which the underwriters are anſwerable, the ſubject naturally leads one to conſider, when loſſes ſhall be ſaid to be total, and when partial or *average*, as they have been moſt commonly denominated. When we ſpeak of a total loſs, we do not always mean to ſignify, that the property inſured is irrecoverably loſt or gone: but that, by

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ſome of the perils mentioned in the policy, it is in ſuch a condition, as to be of little uſe or value to the inſured, and ſo much injured, as to juſtify him in abandoning to the inſurer, and in calling upon him to pay the whole amount of his inſurance, as if a total loſs had actually happened. But the idea of a total loſs, in this ſenſe of the word, is ſo intimately blended and interwoven with the doctrine of abandonment, that it will add much to clearneſs and preciſion, to refer what may be ſaid on this ſubject, till we come to the chapter on abandonment. In this place it will be ſufficient to remark, 2 Burr. 1170. that in caſe of a total loſs, properly ſo called, the prime coſt of the property inſured, or the value mentioned in the policy, muſt be paid by the underwriter; at leaſt, as far as his proportion of the inſurance extends. This is evident from the nature of the contract; for the inſurer engages, as far as to the amount of the prime coſt, or value in the policy, that the thing inſured ſhall come ſafe: he has nothing to do with the market; he has no concern in any profit or loſs which may ariſe to the merchant from the ſale of the goods. If they be totally loſt, he muſt pay the prime coſt, that is, the value of the thing he inſured, at the *outſet*: he has no concern in any ſubſequent value. So likewiſe, if part of the cargo, capable of a ſeveral and diſtinct valuation at the outſet, be totally loſt; as if there be one hundred hogſheads of ſugar, and ten happen to be loſt, the inſurer muſt pay the prime coſt of thoſe ten hogſheads, without any regard to the price, for which the other ninety may be ſold. Thus much at preſent for total loſſes. * P. 99

The ſubject of this and the following chapter, ſeems to be of all others the moſt intricate and perplexing, in the whole law of inſurance; an intricacy, which ariſes from ſeveral cauſes. In the firſt place, the ſubject of average has very ſeldom fallen under the cognizance of courts of judicature in this country; conſequently there are very few adjudged caſes to be found: In this ſcarcity of ſettled principles, recourſe muſt be had to the writers of foreign nations, and to ſuch of our own as have written upon commerce in general: but the reſearch is by no means attended with ſatisfaction, much leſs with conviction. Another ſource of perplexity upon this ſubject is, the irregularity and confuſion, which we meet with in the preſent form of policies of inſurance, Ambiguities frequently ariſe in them, by uſing the ſame words in different ſenſes; and, in no inſtance, is this abſurdity more glaring than in the uſe of the word average. This word in *policies* has two ſignifications; for it means "*a contribution to a general loſs*;" and it alſo is uſed to ſignify "*a particular partial loſs*. In commercial affairs, indeed, it has no leſs than four different meanings; and therefore, it cannot be wondered at, if much confuſion of 3 Burr 1555

ideas

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ideas has arisen upon the subject. In order to prevent that, if possible, in the subsequent part of this work, I shall here endeavour to distinguish between the four different senses of the word "average;" and wherever I shall have occasion in future to speak of a damage arising to goods or other property, not total, except when I am reciting the words of a policy, I shall take the liberty of calling it, as I have already done at the head of this chapter, a *partial*, not an *average* loss.

Lex Merc. red 147.

When goods or merchandizes carried by sea, are thrown overboard in a storm, for the purpose of lightening the ship; the owners of the ship and of the goods saved contribute for the relief of those, whose goods are ejected, in such a manner, that all, who profited by the lightening of the ship, may bear a proportional loss of the goods, thus thrown overboard for the common safety. This contribution is what is called general or

* P. 100

* gross average; the full discussion of which will be the business of the next chapter.

Small or petty averages are the next species; and, as these never fall upon the underwriters, I shall here set down all that is ne-

Magens 72.

cessary upon that subject. Petty average consists in such charges and disbursements, as according to occurrences, and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage. These charges are, lodemanage,

Cowel. 2 Mag. 180. & 78.

which, as it appears by *Cowel's* interpreter, means the hire of a pilot for conducting a vessel from one place to another; towage, pilotage, light-money, beaconage, anchorage, bridge-toll, quarantine, river charges, signals, instructions, passage money by castles, expences for digging a ship out of the ice when frozen up, that it may be brought into a proper harbour; and at *London*, by custom, the fee paid at *Dover* pier. These seem to be all the articles which come under the denomination of petty or accustomed average, as well in this as in foreign countries.

Mag. 72.

For these charges, the insurers are never answerable; but one third of the expences is borne by the ship, and two thirds upon the cargo. But in order to discharge the insurer, it must appear that the disbursements were usual and customary in the voyage; for if they were incurred for any extraordinary purpose, or in order to relieve the ship and cargo from some im-

1 Mag. 72.

pending danger, they shall then be reputed a general average, and consequently be a charge on the insurer. In lieu of these petty averages, it has become usual at some places to pay 5 *per cent.* calculated on the freight, and 5 *per cent.* more for primage to the captain.

Another species of average, in matters of commerce, is that which we are accustomed to meet with in bills of lading, "paying so much freight for the said goods, with primage and

"*average*

"*average* accuſtomed." In this ſenſe it ſignifies a ſmall duty, which merchants, who ſend goods in the ſhips of other men, pay to the maſter, over and above the freight, for his care and attention to the goods ſo entruſted to him. This kind of average may alſo be laid out of the preſent * enquiry, as it is too inſignificant a charge to fall upon the underwriter.

Jacob's Law Dict. title Average.

* P. 101

Having thus diſpoſed of the different kinds of average, ſo as to prevent a confuſion of ideas, we ſhall now proceed to the main ſubject propoſed, namely, what ſhall be conſidered as a partial loſs; how ſuch a loſs ſhall be adjuſted, and in what proportion it ſhall be paid. I ſaid, at the beginning of this chapter, that theſe were queſtions of intricacy; and ſo moſt undoubtedly they formerly were: but much light has been thrown upon them by Lord *Mansfield*, in his elaborate and very learned argument in the caſe of *Lewis* v. *Rucker*; and, as that caſe has been frequently recognized, and has ever ſince been looked up to, as the rule and ſtandard of deciſion, upon ſimilar occaſions, I have drawn moſt of my ideas upon this ſubject from the reaſoning there made uſe of by his lordſhip in delivering the opinion of the court.

2 Burr. 1167.

Partial loſs, *ex vi termini*, implies a damage, which the ſhip may have ſuſtained, in the courſe of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it alſo means the damage which goods may have received, without any fault of the maſter, by ſtorm, capture, ſtranding or ſhipwreck, although the whole, or the greater part thereof may arrive in port. Theſe partial loſſes fall upon the owners of the property ſo damaged, who muſt be indemnified by the underwriter. For if the goods arrive, but leſſened in value through damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it can only be effected by putting the merchant in the ſame condition in which he would have been, if the goods had arrived free from damage.

2 Burr 1172.

The underwriters of *London* expreſsly declare, as appears from a memorandum at the foot of the policy, that they will not anſwer for partial loſſes, not amounting to 3 *per cent.* This clauſe was introduced into *Engliſh* policies about the year 1749, having long before that time been generally uſed in almoſt all the trading countries in *Europe*; and it was intended to prevent the underwriters from being continually harraſſed by trifling demands. But at the ſame time, that they provide againſt trifling claims for partial loſſes, they undertake to indemnify * againſt loſſes, however inconſiderable, that ariſe from a general average; becauſe that can never happen but in caſes of imminent danger when it is for the common intereſt that ſuch expences ſhould be incurred.

Vide the Appendix. No. 1

* P. 102

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It has been obſerved by a very ſenſible merchant, who has written upon inſurances, that almoſt all the ordinances ſeem deficient, in not fully explaining in what caſes, and in what manner, the damage ariſing from a partial loſs, ſhall be deemed to exceed 3 *per cent.* To illuſtrate his meaning, he ſtates this caſe. Suppoſe, ſays he, a merchant has ſhipped 101 cheſts of goods, of which on arrival, three cheſts are, by the ſea, or by ſome accident, ſo ſpoiled, as to be worth nothing; if the damage be calculated as on the whole value of 101 cheſts, it will not exceed 3 *per cent.* and it is thought by moſt inſurers not to be recoverable, in ſuch a caſe, by the inſured: eſpecially if the inſurance be made, without expreſsly declaring, in the policy, the particular ſum inſured on each cheſt. The foundation of this opinion is, that it is conſidered as one entire inſurance, and not a diſtinct inſurance on each ſhip.

1 Magens 73.

This is a point, which at firſt view may ſeem to fall within a caſe laid down by Lord *Mansfield.* If, ſaid his lordſhip, the cargo be totally loſt, the underwriter muſt pay the value of the thing he inſured. So, if part of the cargo, capable of a ſeveral and diſtinct valuation at the outſet be *totally* loſt; as if there be 100 hogſheads of ſugar, and ten happen to be loſt, the inſurer muſt pay the prime coſt of thoſe ten hogſheads, without any regard to the price for which the other 90 may be ſold. So it has been ſuppoſed in the caſe put by *Magens*, the three cheſts of goods are as capable of a diſtinct and ſeveral valuation, as the three hogſheads of ſugar; and conſequently are to be paid for, as for a total loſs. But Lord *Mansfield* is putting a caſe merely to ſhew, that the market price is not at all to be conſidered in charging the inſurer; and his Lordſhip certainly had not in his contemplation the caſe put by *Magens.*

1 Burr. 1170.

As clearneſs and preciſion are neceſſary upon all ſubjects, and more eſpecially upon this, it will be proper to obſerve, that * when we ſpeak of the underwriter being liable to pay, whether for total or partial loſſes, it muſt always be underſtood, that they are liable only in proportion to the ſums which they have underwritten. Thus, if a man underwrite 100*l.* upon property valued at 500*l.* and a total loſs happen, he ſhall be anſwerable for 100*l.* and no more, that being the amount of his ſubſcription: if only a partial loſs, amounting to 60*l.* or 70*l. per cent.* upon the whole value; he ſhall pay 60*l.* or 70*l.* being his proportion of the loſs.

* P. 103

When a total loſs happens, the inſured is entitled to recover againſt the underwriter, as ſoon as he has proved the value of the thing inſured: but when the value is inſerted in a policy, the inſurer by allowing ſuch inſertion, has admitted the value to be as ſtated; and nothing remains but to prove, that

1 Magens 35.

that the goods insured were actually on board the ship. It is only in cases of total loss that any difference consists between a valued, and an open policy: in the former case the value is ascertained; in the latter, it must be proved. But where the loss is partial, the value in the policy can be no guide to ascertain the damage; which then necessarily becomes a subject of proof, as much as in the case of an open policy.

Vide ante, c. 1. p. 1.

When a partial loss happens, the first enquiry which naturally arises is this; for what does the insurer undertake to indemnify the owner, in case of a partial loss? To answer this question, regard must be had to the nature of the contract, between the underwriter and the merchant. What is the nature of the contract? That the goods shall come safe to the port of delivery; or if they do not, that the insurer will indemnify the owner to the amount of the value of the goods, stated in the policy. Wherever then the property insured is lessened in value, by damage received at sea, justice is done by putting the merchant in the same condition (relation being had to the prime cost or value in the policy) which he would have been in, if the goods had arrived free from damage; that is by paying him such proportion of the prime cost or value in the policy as corresponds with the proportion of the diminution in value occasioned by the damage. The question then is, how is the proportion of damage to be ascertained? It certainly cannot be by any measure taken from the prime cost: * but it may be done in this way. Where an entire thing, as one hogshead of sugar happens to be spoiled, if you can fix, whether it be a third, a fourth, or a fifth worse, then the damage is ascertained to a mathematical certainty. How is this to be found out? Not by any price at the port of discharge; but it must be at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the same thing; for in either case, it equally shews, whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost, if the thing be wholly lost; so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth, not of the value for which it sold, but of the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all charges, and the premium of insurance, shall be the foundation, upon which the loss shall be computed.

2 Burr. 1172. 1173.

2 Burr. 1170.

* P. 104

2 Magens 37.

This rule of ascertaining damage, occasioned by a partial loss, seems to be fraught with so much good sense, to be so very comprehensive, and so intelligible to every understanding, that it will now be only necessary to shew, that the decided

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cases have been agreeable to that rule: first requesting the reader to bear in mind, what has already been mentioned, namely, that the value, upon which the foregoing calculation rests, is the prime cost of the commodity, wholly independent of the rise or fall of the market, or the schemes or speculation of the merchant.

Dick and another v. Allen, at Guildh. after Mich. Term, 1785.

In an action upon a policy of insurance to recover an average loss upon goods, Mr. Justice *Buller* observed, that in such cases, whether the goods arrived to a good or bad market was immaterial; for the true way of estimating the loss was to take them at the fair invoice price.

Lewis and Another v. Rucker. 2 Burr. 1167. * P. 105

A rule having been obtained by the plaintiffs, who were the insured, for the defendant (the insurer) to shew cause, why a verdict, obtained by him, should not be set aside, and a new trial had:

* The court, after hearing the matter fully debated, took time to advise, and their unanimous opinion was delivered to the following effect.

Lord *Mansfield*.—This was an action brought upon a policy, by the plaintiffs, for Mr. *James Bourdieu*, upon the goods on board a ship, called the *Vrow Martha*, at and from *St. Thomas Island* to *Hamburgh*, from the loading at *St. Thomas Island*, till the ship should arrive, and land the goods at *Hamburgh*. The goods, which consisted of sugars, coffee and indigo, were valued; the clayed sugars at 30*l. per* hogshead; the *Muscavado* sugars at 20*l. per* hogshead; and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average, (that is partial loss) under 5*l. per cent*; and all other good free from average under 3*l. per cent.* unless general or the ship be stranded.

In the course of the voyage the sea water got in; and when the ship arrived at *Hamburgh*, it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained, made it necessary to sell them immediately; and they were accordingly sold; but the difference between the price which they brought, on account of the damage, and that which they might then have been sold for at *Hamburgh*, if they had been sound, was as 20*l.* 0*s.* 8*d. per* hogshead is to 23*l.* 7*s.* 8*d. per* hogshead: (that is, if sound, they would have been worth 23*l.* 7*s.* 8*d. per* hogshead; as damaged, they were only worth 20*l.* 0*s.* 8*d. per* hogshead.)

The defendant paid money into court, by the following rule of estimating the damage: he paid the like proportion of the sum, at which the sugars were valued in the policy, as the price of the damaged sugars bore to sound sugars at *Hamburgh*, the port of delivery. All this was admitted at the trial; though perhaps upon an accurate computation, there may be a mistake of about 17*s.* on the money paid in. But no advantage was at-

attempted to be taken of this ſlip; it was admitted, that the money paid in was ſufficient, if the rule, by which the defendant eſtimated the loſs, was right: and the only queſtion was, by what meaſure or rule the damage, upon all the circumſtances of the caſe, ought to be eſtimated.

* To diſtinguiſh this caſe, under its particular circumſtances, out of any general rule, the plaintiff's counſel called Mr. *Samuel Chollett*, clerk to Mr. *Bourdieu*, who proved, that upon the 15th of *February*, the time of the inſurance, ſugars were worth at *London* and *Hamburgh* 35*l.* a hogſhead; that the propoſal of a Congreſs to be holden, and the expectation of a peace, had, on a ſudden, ſunk the price of ſugars: that before the ſhip arrived at *Hamburgh*, and before he knew that the ſugars had received any damage, Mr. *Bourdieu* had ſent orders, that the ſugars ſhould be houſed at *Hamburgh*, and kept till the price ſhould riſe above 30*l.* a hogſhead: that he had many hundred hogſheads of ſugar lying at *Amſterdam*, to which place he had ſent the like orders; that the congreſs not taking place, *in fact* ſugars roſe 25 *per cent.*: that what he ſold of the ſugars, which he had at *Amſterdam*, brought 30*l.* *per* hogſhead, and upwards: that he might have ſold theſe ſugars at the ſame price, if they had been kept, according to his orders; and the only reaſon for which they were not kept was, becauſe they were rendered periſhable from the ſea water, which had got in. Therefore, ſaid they, the neceſſity of an immediate ſale, and the conſequence thereof, ought to be computed into the damage. * P. 106

The ſpecial jury (amongſt whom there were many ſenſible merchants) found the defendant's rule of eſtimation to be right, and gave their verdict for him. They underſtood the queſtion very well, and knew more of the ſubject of it, than any body elſe preſent; and they formed their judgment from their own notions and experience, without much aſſiſtance from any thing that paſſed.

The counſel for the plaintiff, in the outſet, chiefly reſted upon the particular circumſtances of this caſe. The defendant offered to call witneſſes to prove the general uſage of eſtimating the quantity of damage, when goods are injured.

I was at firſt ſtruck with the argument, that the immediate neceſſity of ſelling in this caſe might be taken into conſideration, as an exception to the general rule; and propoſed that the cauſe might be left to the jury upon that point. But Mr. *Winn* for the defendant argued, that the neceſſity of ſelling, and the conſequence thereof ought not to be regarded: and * what he ſaid, had ſo much weight, that it very much changed my way of thinking. * P. 107

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There was nothing to ſum up; but the jury aſked, whether I would give them any directions. I ſaid, I left it to them, "Whether the difference between the ſound and the damaged "ſugars, at the port of delivery, ought to be the rule; or, "whether the neceſſity of an immediate ſale, certainly occa-"ſioned by the damage and the loſs thereby, ſhould be taken "into conſideration." I told them, though it had ſtruck me "at firſt, this might be an exception; yet what the counſel for the defendant ſaid to the contrary, ſeemed to have great weight." The verdict was for the defendant; and a new trial was moved for.

No fact is now diſputed; the only queſtion is, whether the jury have eſtimated the damage by a proper meaſure. To make this matter more intelligible, I will firſt ſtate the rule, by which the defendant and the jury have gone; and then I will examine whether the plaintiff has ſhewn a better.

The defendant takes the proportion of the difference between ſound and damaged at the port of delivery, and pays that proportion upon the value of the goods ſpecified in the policy; and has no regard to the price in money, which either the ſound or the damaged goods bore in the port of delivery. He ſays, the proportion of the difference is equally the rule, whether the goods come to a riſing or a falling market. For inſtance, ſuppoſe the value in the policy to be 30*l.* the goods are damaged; but ſell for 40*l.*: if they had been ſound, they would have ſold for 50*l.* The difference then between the ſound and damaged is a fifth; conſequently the inſurer muſt pay a fifth of the prime coſt, or value in the policy, that is 6*l.* *e converſo*, if they come to a loſing market, and ſell for 10*l.* being damaged, but would have ſold for 20*l.* if ſound, the difference is one half: the inſurer muſt pay half the prime coſt, or value in the policy, that is 15*l.*

To this rule, two objections have been made. Firſt, that it is going by a different meaſure in the caſe of a partial, from that which governs in caſe of a total loſs; for upon a total loſs, the prime coſt, or value in the policy muſt be paid. The
1 8 * anſwer to which objection is, that the diſtinction is founded in the nature of the thing. Inſurance is a contract of indemnity againſt the perils of the voyage, to the amount of the value in the policy; and therefore, if the thing be totally loſt, the inſurer muſt pay the whole value which he inſured at the outſet. But where a part of the commodity is ſpoiled, no meaſure can be taken from the prime coſt to aſcertain the quantity of the damage ſuſtained. The only way is to fix, whether the thing be a third or fourth worſe than the ſound commodity; and then

then you pay a third or fourth of the prime coſt, or value of the goods ſo damaged. †

The next objection, with which this caſe has been entangled, is taken from the circumſtance of the policy in queſtion being a valued policy.

I am a little at a loſs to apply the arguments drawn from thence. It is ſaid, "that a valued is a wager policy, like *in-* "*tereſt or no intereſt*; and if ſo, there can be no partial loſs, "and the inſured can only recover as for a total loſs, aban- "doning what is ſaved, becauſe the value ſpecified is ficti- "tious."

A valued policy is not to be conſidered as a wager policy, or like "*intereſt or no intereſt.*" If it were, it would be void by the ſtatute of 19 *Geo.* 2. c. 37. The only effect of the valuation, is fixing the amount of the prime coſt, juſt as if the parties admitted it at the trial: but in every argument, and for every other purpoſe, it muſt be taken, that the value was fixed in ſuch a manner, as that the inſured meant to have an indemnity only, and no more. If it be undervalued, the merchant himſelf ſtands the inſurer for the reſt. If it be much overvalued, it muſt be done with a bad view, either to gain, contrary to the 19th of *George* the Second, or with ſome view to a fraudulent loſs; therefore, the inſured never can be allowed to plead in a court of juſtice, that he has greatly overvalued, or that his intereſt was merely a trifle.

Vide poſt. chap. 14th.

*It is ſettled that upon valued policies, the merchant need only prove ſome intereſt to take them out of the 19th *Geo.* 2.; becauſe the adverſe party has admitted the value: and if more proof were required, the agreed valuation would ſignify nothing. But if it ſhould come out in proof, that a man had inſured 2000*l.* and had intereſt on board to the value of a cable only; there never has been, and, I believe, there never will be a determination, that, by ſuch an evaſion, the act of parliament may be defeated. There are many advantages from allowing valued policies: but where they are uſed merely as a cover to a wager, they would be conſidered as an evaſion. To argue that there can be no adjuſtment of a partial loſs upon a valued policy, is directly contrary to the very terms of the policy itſelf. It is expreſsly *ſubject to average*, if the loſs upon ſugars exceed 5 *per cent*; and even if it were not ſubject to average, the conſequence would be, that every partial loſs muſt thereby become total; but only the event, to entitle the inſured

* P. 109

† In Lord *Mansfield*'s argument, in anſwer to the firſt objection, I have taken the liberty of abridging much of what fell from his lordſhip, having already inſerted it, in the former part of the chapter, where I laid down the rules of deciſion upon this point.

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to recover, would not happen, unleſs there was a total loſs. Conſequently the plaintiff in this caſe would not be entitled to recover at all; for there is no colour to ſay that this was a total loſs: beſides the plaintiffs have taken the goods and ſold them.

In oppoſition to the meaſure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of two grounds.

1ſt. Becauſe the general rule of eſtimating ſhould be the difference between the price the damaged goods ſell for, and the prime coſt or value in the policy. Here the damaged ſold at 20*l.* 0*s.* 8*d. per* hogſhead; and the underwriter ſhould make it up 30*l.* To this I anſwer, that it is impoſſible that ſhould be the rule: it would involve the underwriter in the riſe or fall of the market: it would ſubject him, in ſome caſes, to pay vaſtly more than the loſs; in others, it would deprive the inſured of any ſatisfaction, though there was a loſs. For inſtance, ſuppoſe the prime coſt or value in the policy 30*l. per* hogſhead; the ſugars are injured; the price of the beſt is 20*l.* a hogſhead; the price of the damaged is 19*l.* 10*s.* The loſs is about a ſortieth, and the inſurer would be to pay above a third. Suppoſe they come to a riſing market, and the ſound ſugars ſell for 40*l.* a hogſhead, and the damaged for 35*l.* the loſs is an eighth, yet the inſurer would be to pay nothing.

Vide ſupra Duck v. Allen p. 104.

* P. 110

* The 2d ground, upon which the plaintiffs contended that the 30*l.* ſhould be made up, is, that it appears the ſugars would have ſold for that price, if the damage from the ſea water had not made an immediate ſale neceſſary. The moment the jury brought in their verdict, I was ſatisfied that they did right, in totally diſregarding the particular circumſtances of this caſe; and I wrote a memorandum at *Guildhall*, in my note-book, that the verdict ſeemed to me to be right. As I expected that the other cauſe upon the ſame point would be tried, I thought a good deal upon the queſtion, and endeavoured to get what aſſiſtance I could, by converſing with ſome gentlemen of experience in adjuſtments. The point has now been fully argued at the bar; and the more I have thought, the more I have heard upon the ſubject, the more I am convinced, that the jury did right to pay no regard to theſe circumſtances.

The nature of the contract is, that the goods ſhall come ſafe to the port of delivery, or if they do not, that the inſurer will indemnify the plaintiff to the amount of the prime coſt. If they arrive, but leſſened in value; in order to indemnify the owner, he muſt be put in the ſame condition, in which he would have been if the goods had arrived free from damage: that is by paying ſuch proportion or *aliquot* part of the prime coſt, as correſponds with the proportion or *aliquot* part of the diminution in value occaſioned by the damage.

The

The duty accrues upon the ſhip's arrival and landing her cargo at the port of delivery: the inſured has then a right to demand ſatisfaction. The adjuſtment can never depend upon future events or ſpeculations. How long is he to wait? a week, a month, or year?

In this caſe, the price roſe: but if the Congreſs had taken place, or a peace had been made, it would have fallen. The defendant did not inſure, that there ſhould be no congreſs or peace. It is true Mr. *Bourdieu* acted upon political ſpeculation, and ordered the ſugars to be kept till the price ſhould be 30*l.* and upwards: but no private ſcheme or project of trade of the inſured can affect the inſurer; for he knew nothing of it. The defendant did not undertake that the ſugars ſhould bear a price of 30*l.* a hogſhead. If ſpeculative deſtinations of the merchant, and the ſucceſs of ſuch ſpeculations were to be* regarded, it would introduce the greateſt injuſtice and inconvenience: the underwriter knows nothing of them: the orders here were given after the policy was ſigned. But the deciſive anſwer is, that the inſurer has nothing to do with the price; and that the right of the inſured to a ſatisfaction ariſes immediately upon their being landed at the port of delivery.

* P. 111

We are of opinion, that the plaintiffs are not entitled to have the price, for which the damaged ſugars were ſold, made up 30*l. per* hogſhead: and it ſeems to us as plain as any propoſition in *Euclid*, that the rule by which the jury have gone, is the right meaſure.

In a ſubſequent caſe, which will hereafter be mentioned for another purpoſe, Lord *Mansfield* ſaid, that the caſe of *Louis* v. *Rucker* ſhould be the rule in all ſimilar caſes, that is, wherever there was a ſpecifick deſcription of caſks or goods: but in *Le Cras* v. *Hughes*, the property, which conſiſted in various goods taken from an enemy, was valued at the ſum inſured, and part was loſt by perils of the ſea; conſequently the ſame rule could not be adopted, on account of the nature of the thing inſured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that ſum, as the amount of the goods loſt.

Le Cras v. Hughes. P. R. Faſt. 22 Geo. 3. Vide poſt. c. 14.

Since the 19 of *Geo.* 2. the conſtant uſage has been to let the valuation fixed in the policy remain, in caſe of a total loſs; unleſs the defendant can ſhew that the plaintiff had a colourable intereſt only, or that he has greatly overvalued the goods: but a partial loſs opens the policy. This cuſtom, ſaid Lord *Mansfield*, was introduced by Lord Chief Juſtice *Lee*, in a caſe of *Eraſmus* v. *Banks*: and in another caſe of *Smith* v. *Flexney*, which happened about the ſame period, the ſame rule of deciſion was adopted.

M. 21. Geo. 2.

By the ordinances of *Hamburgh* it is declared, that in caſe of a damage to goods, the aſſured is not to open the damaged goods,

2. Magens 228.

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goods, but in the preſence of the aſſurers or their deputies; but if time and circumſtances do not give opportunity to call them, yet the goods muſt not be opened, but in the preſence of * a notary, and ſome witneſſes. I can find no ſuch regulation in the law of inſurance in *England*, nor do I underſtand, that any ſuch is adopted in practice. Indeed it ſeems to be needleſs; becauſe an aſſured, in order to entitle himſelf to recover for a partial loſs, muſt prove by diſintereſted witneſſes, to the ſatisfaction of the jury, the quantity of goods damaged in the courſe of the voyage. The parties may, however, inſiſt upon being preſent.

* P. 112

It will be proper here to remark that ſome goods are of a periſhable nature; and therefore, when they are damaged by ſuch natural and inherent principle of corruption in themſelves, the underwriters by the ordinances of moſt countries, are held to be diſcharged. The underwriters of *London* have indeed, by expreſs words inſerted in their policy, declared, that they will not be anſwerable for any partial loſs happening to corn, fiſh, ſalt, fruit, flour, and ſeed, unleſs it ariſe by way of a general average, or in conſequence of the ſhip being ſtranded. This clauſe was introduced by the underwriters, to prevent the vexation of trifling demands, which muſt have ariſen in every voyage, on account of the very periſhable nature of thoſe commodities, which we have juſt had occaſion to enumerate. This form was formerly uſed by the two inſurance companies, as well as by the private inſurers, till the year 1754, when a ſhip having been ſtranded, and got off again, the inſurance recovered a ſmall partial loſs againſt the *London* Aſſurance Company, ſince which period, the Companies have left out the words, "*or the ſhip be ſtranded*;" and are now only liable, in caſes of a general average: but the old form is ſtill retained by private inſurers.

Ord. of France Stockholm, and Hamburgh.

Vide appendix No. 1,

Cantillon v. the London Aſſur. Comp. cite in 3 Burr. 1553.

Upon this clauſe there have been ſeveral determinations, in all of which it has been uniformly held, that the underwriters can in no caſe be anſwerable for a partial loſs to ſuch commodities: and that no loſs ſhall be deemed a total one, but the abſolute deſtruction of the thing inſured; for that while it ſpecifically remains, though perhaps wholly unfit for uſe, no loſs has happened within the meaning of this memorandum. It may alſo be proper to premiſe that *Corn* is a general term, and includes many particulars; peas and beans have been held to come within the meaning of the word.

Maſon v. Skurray. Vide poſt.

* P. 113

* But in a late trial at *Guildhall* in the court of common pleas, Mr. Juſtice *Wilſon* was of opinion, that the term *ſalt* uſed in the memorandum did not include ſalt-petre.

Journu v. Bourdieu Sittings after Eaſter Term, 27 Geo. 3.

An action upon a policy of inſurance was brought for the recovery of 56*l.* 19*s.* 8*d. per cent.* being the damage received by a cargo of wheat on board the *Boſcawen* inſured at and from *Lancaſter* to *Rotterdam*. The wheat was valued by agreement at

Wilſon v. Smith 3 Burr. 1550.

at 30*s.* *per* quarter. The policy was in the ordinary form, with the uſual clauſe at the bottom, that corn. fiſh, fruit, *&c.* ſhould be warranted free from average, unleſs general, or the ſhip be ſtranded. The defendant underwrote this policy for 100*l.* The defendant having pleaded the general iſſue, the cauſe came on to be tried; and a ſpecial caſe was reſerved for the opinion of the Court, ſtating, that after the ſhip's departure from *Lancaſter*, and before her arrival at *Rotterdam*, ſhe met with a violent ſtorm: that ſhe was by and through the force of winds and ſtormy weather, obliged to cut away, and leave her cable and anchor, for the ſafety of the ſhip and cargo: that ſhe was alſo greatly damaged and obliged to run to the firſt port to refit: that the expence of refitting the ſhip amounted to 38*l.* 15*s.* *per cent.* which the defendant in this caſe had paid, being a general average. The caſe then ſtates, that the hatches were not opened at *Liverpool:* (the place where ſhe had gone to repair) but the ſhip, being refitted, proceeded on her voyage, and arrived at *Rotterdam*, where her cargo of wheat was landed: that upon her unloading it, it appeared that it had received damage by the ſaid ſtorm to the amount of 56*l.* 19*s.* 8*d.* *per cent.*

The ſingle queſtion was, upon the true conſtruction and meaning of the words, "*free from average, unleſs general, or the ſhip be ſtranded,*" whether the plaintiff could under the circumſtances recover in this action for the damage of 56*l.* 19*s.* 8*d.* *per cent.* After two arguments, the Court gave judgment for the defendant.

Lord *Mansfield* — Policies of inſurance, according to their preſent form, are very irregular and confuſed: an ambiguity ariſes in them from uſing the ſame words in different ſenſes; particularly, in the uſe of the word *average.* It is uſed to ſignify a contribution to a general loſs; and it is alſo uſed to ſig- * P. 114
nify a particular partial loſs.

But whether it be conſidered in one, or other of theſe ſenſes, it will not avail the plaintiffs in this caſe. For if it here ſignify *contribution*, the inſurer is to be free from contribution, unleſs the contribution be general. If it ſignify *loſs*, then plainly it is warranted free from all particular loſs. The inſurer is liable to all loſſes ariſing from the ſhip being ſtranded; and in all caſes, where there is a general average: but all other partial loſſes are excluded by the expreſs terms of the policy.

The word "unleſs" means the ſame as "except;" and never can be conſtrued as a condition, in the ſenſe that the counſel for the plaintiffs would put upon the word "condition," namely, to be free from partial loſs, unleſs in two events, *viz.* a general average, or the ſtranding of the ſhip: but if either of thoſe events did happen, then to be liable to all other average. The words "free from average unleſs general," can never mean

to

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to leave the insurer liable to any particular damage. It is clear then that the plaintiff ought not to recover; and that judgment ought to be given for the defendant.

Cocking v. Fraser B. R. Hil. 25 G. 3. Vide ante p. 21.

In a very modern case a question arose upon the memorandum. It was an action brought upon a policy of insurance to recover against the underwriters for a total loss of the cargo. The jury found a verdict for the plaintiff, subject to the opinion of the Court upon a special case.

The case states, that the ship sailed from *Newfoundland* on the 2d of *December* 1783, with a cargo of fish: that on the 11th they hove overboard 40 quintals for the general preservation of the ship and cargo: that on the 20th, they threw over 20 quintals more for the same purpose. The ship had exceeding bad weather till her arrival at *Lisbon*, on the 10th of *January* 1784, the ship being bound to *Figara*. When she arrived at *Lisbon*, a survey was had at the request of the captain, who was also the consignee of the goods, by the Board of Health; and it appeared to them, and so the fact was, that the cargo was of *no value* through sea damage. The ship did not proceed to *Figara*, The defend-

* P. 115 * ant has paid into Court the amount of the partial loss sustained by the ship, and also the general average upon the cargo.

Lord *Mansfield*. Most litigations arise from improper statements of cases, and from not properly defining terms. This clause relative to fruit and fish, is now a very old one in policies of insurance. The insurer undertakes for all losses, except particular damage, unless the ship be stranded: he engages against a total loss. What is a loss? The total loss of the thing insured is the *absolute destruction* of it, by the wreck of the ship. The fish may all come to port; though from the nature of the commodity, it may be damaged, it may be stinking: still as the commodity *specifically* remains, the underwriter is discharged.

The other judges concurred, Mr. Justice *Buller* observing, that from the first introduction of the clause in the year 1749, till the present time, the underwriter never has been held answerable but in cases where there has been a total loss of the commodity.

Boyfield v. Brown 2 Stra. 1065.

There is indeed a case in Sir *John Strange's* reports, which seems to militate against the above decisions.

Upon the execution of a writ of enquiry before Lord *Hardwicke*, when Chief Justice, it appeared, that the defendant was an insurer to the amount of 200*l.* upon corn, the value of which was 217*l.*; that the corn was so damaged in the voyage, that it sold for 67*l.* only, and the freight came to 80*l.* The question upon this case was, whether as the freight exceeded the salvage, this was not to be considered as a total loss.

The Chief Justice was of opinion, that within the reason of deducting the freight, when the salvage exceeds it; the plaintiff

tiff in this caſe, wherein it fell ſhort, was entitled to have it conſidered as a total loſs. The jury accordingly found for the plaintiff.

Upon this caſe, it may be obſerved, that it was decided prior to the introduction of the clauſe, upon which ſo much has lately been ſaid; and conſequently, ſuch a deciſion can have no weight now, becauſe the law is altered on account of the * agreement of the parties. Indeed the caſe I am about to cite was exactly ſimilar in circumſtances to *Boyfield* v. *Brown*: but Lord *Mansfield* in his charge to the jury gave a very different direction, and the jury found accordingly. * P. 116

It was an action brought on a policy of inſurance on goods, on board the *Happy Recovery* at and from *London* to *St. Auguſtine*, to recover for a total loſs. The cargo was *peas*, which, in a former cauſe on the ſame policy, were held to fall within the general denomination of *corn*, in the memorandum at the foot of the policy. The peas arrived at the place of deſtination; but being much damaged, the produce of them was leſs by about three fourths than the freight, which, on account of the ſhip's arrival at the port of diſcharge, became due. Maſon v. Skurray Sittings after Hilary Term 1780. at Guildhall. Vide ante 112.

The defence ſet up by the underwriter was, that if the goods mentioned in the memorandum arrive at the market, though a loſs amounting to a total one has happened, the underwriters are not liable. Four or five witneſſes converſant in ſettling loſſes upon policies being called, proved, that the uſage was, in ſuch caſes, to hold the underwriter diſcharged.

Lord *Mansfield* told the jury, this was a queſtion of conſequence, and it turned upon the general import of the exception: the witneſſes examined have put it on that point; and they hold, that if the ſpeciſick thing came to the port of delivery, the underwriter cannot be called on. How did this matter ſtand before the year 1749? When the policy was general, and operated as an indemnity, there was little difference between a total and a partial loſs. His lordſhip here ſtated the determination of *Boyfield* v. *Brown*, which, he obſerved, was prior to the clauſe in queſtion. But the caſes now ſtand upon the memorandum, which is in very general words. The queſtion is, whether the uſage has not explained the generality of the words: if it has, every man, who contracts for a policy under uſage, does it, as if the point of uſage were inſerted in his contract *in terms*. The witneſſes examined all ſwear it to be *underſtood*, that if the ſpeciſick thing comes to the market, the memorandum warrants the inſurer to be free from any demands for an average, or partial loſs. The jury found for the defendant.

* The caſe of *Boyfield* v. *Brown* has certainly been overturned by this deciſion, which was recognized as a proper determination in the caſe of *Baillie* v. *Modigliani*, before cited, where P. 117

Mr.

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Mr, Juſtice *Buller* ſaid, that the caſe in *Strange's* Reports had been expreſsly over-ruled by the Court in the caſe of *Maſon* v. *Skurray*.

Vide ante, c. 2. p. 53.

When the quantity of damage ſuſtained in the courſe of the voyage is known, and the amount, which each underwriter upon the policy is liable to pay, is ſettled, it is uſual for the underwriter to endorſe on the policy, "*adjuſted this loſs, at "ſo much per cent.*" or ſame words to the ſame effect. This is called an adjuſtment.

It has been determined, that after an adjuſtment has been ſigned by the underwriter, if he refuſe to pay, the owner has no occaſion to go into the proof of his loſs, or any of the circumſtances reſpecting it. This, it is ſaid, has been the invariable cuſtom upon this ſubject; which ſeems perfectly juſt, as the underwriter has under his hand expreſsly admitted, that the plaintiff has ſuſtained damage to a certain amount. To be ſure, if any fraud were diſcovered in obtaining the adjuſtment, that might be a ground for ſetting it aſide: but ſuppoſing the tranſaction fair, as we muſt always do till proof is given to the contrary, the rule of not ſuffering the adjuſtment to be contradicted, is fair and equitable.

Hog v. Gouldney, Sittings after Trin. 1745. at Guildhall. Beawes Lex Mer. 310.

An action was brought, by the plaintiff againſt the defendant, on a policy of inſurance which the latter underwrote in *November* 1743, on the ſhip *George* and *Henry* captain *Bower*, at and from *Jamaica* to *London*, intereſt or no intereſt, free of average, and without benefit of ſalvage to the inſurers, with a warranty annexed to the policy, that the ſhip ſhould ſail from *Jamaica* with the fleet that came out under convoy of the *Ludlow Caſtle* man of war. The ſhip ſailed with the fleet under that convoy, but was damaged ſo much, as to oblige her to bear away for *Charleſtown*, where ſhe was condemned and broken up. The plaintiff demanded his inſurance; and all the underwriters, being ſatisfied of the truth of the caſe, paid their loſs, except the defendant, who went ſo far as to ſettle

* P. 118

* it, and according to the cuſtom upon theſe occaſions, underwrote the policy in theſe words "adjuſted the loſs on this "policy, at ninety-eight pounds *per cent.* which I do agree "to pay one month after date, *London*, 5th *July*, 1745. "*Henry Gouldney.*"

When the note became due, he inſiſted on fuller proof, particularly of the ſhip's ſailing with convoy, and her condemnation: but as it always was the cuſtom, after adjuſtment and a promiſe to pay, never to require any further proof, but to pay the loſs; and Lord Chief Juſtice *Lee* being of opinion, that this was to be conſidered as a note of hand, and that the plaintiff had no occaſion to enter into the proof of the loſs, the jury found a verdict for the plaintiff. The ſame rule was pur-

purſued in the following year in another caſe, before Lord Chief Juſtice *Lee*, between *Hewitt* and *Flexney*.

The ſpirit of this rule was adopted in a very modern caſe, in an inſurance upon goods on board a *foreign ſhip*, "the policy to be deemed ſufficient proof of intereſt in caſe of loſs." The defendant ſuffered judgment to go againſt him by default; and on a motion to ſet aſide the writ of enquiry, the court of King's Bench ſaid, that although ſuch a policy would be void in this country, by virtue of the ſtatute of the 19th *Geo.* 2. *c.* 37, yet the ſtatute did not extend to policies on foreign ſhips: and in this caſe the underwriter, having ſuffered judgment to go by default, has confeſſed the plaintiff's title to recover; and the amount of that loſs was fixed, by his own ſtipulation in the policy, and which he cannot now controvert. Beawes Lex Merc. 308. Thelluſſon v. Fletcher. Dougl. 301. Vide poſt. c. 14.

One rule relative to adjuſtments remains ſtill to be mentioned, which is, that if an inſurer pay money for a total loſs, and in fact it be ſo at the time of adjuſtment; if it afterwards turn out to be only a partial loſs, he ſhall not recover back the money ſo paid to the inſured. But ſubſtantial juſtice is done, by putting him in the place of the inſured, and giving him all the advantages that may ariſe from the ſalvage.

This rule was ſettled by the King's Bench in the year 1766. It was an action on the caſe for 200*l.* upon an *indebitatus aſſumpſit*, for ſo much money had and received to the uſe of the * plaintiff. *Non aſſumpſit* was pleaded, and iſſue joined. It was brought by the inſurer againſt the inſured, to recover back what he had paid him. At the trial, a caſe was reſerved for the opinion of the court. The facts were; that a policy had been underwritten by the plaintiff, for the inſurance of any of the packet boats, that ſhould ſail from *Liſbon* to *Falmouth*, or ſuch other port in *England*, as his Majeſty ſhould direct, for one whole year, commencing the 1ſt of *October* 1763, and to continue to the 1ſt of *October*, 1764, incluſive, upon any kinds of goods and merchandizes whatſoever: and it was agreed, that the goods and merchandizes ſhould be valued at the ſum inſured on ſuch packet boat, without farther proof of intereſt than the policy, and to make no return of premium for want of intereſt being on bullion or goods. And in caſe of loſs or misfortune, the inſured to be at liberty to ſue, labour and travel, for, in, and about the defence, ſafeguard, and recovery of the ſaid goods, or any part thereof, without prejudice to the inſurance, to the charges whereof the inſurers were to contribute, each one according to the rate and quantity of his ſum inſured. The conſideration paid by the inſured was 10 *per cent.* and in caſe of loſs they were to abate nothing. Then follows the uſual memorandum. Da Coſta v. Firth. 4 Burr. 1966. * P. 119

The caſe then ſtates, that the defendant had an intereſt in bullion, on board the *Hanover* packet, being one of the king's packets

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packets between *Liſbon* and *Falmouth*: that on the 2d of *December*, 1763, it was totally loſt off *Falmouth*, in a voyage between *Liſbon* and *Falmouth*; and the loſs was adjuſted, in writing under the policy, in the words following:—

"Adjuſted a loſs on this policy at 100*l. per cent.* the *Hanover* "packet, captain *Sherborn*, being totally loſt at *Falmouth*. "Should any ſalvage hereafter be recovered, the inſured pro- "miſes to refund to the inſurer whatever he may ſo recover, "in ſuch proportion as the ſum inſured bears to the whole in- "tereſt. *London*, 23 *October*, 1764, for *Richard Seward*, "*Michael Firth*."

The inſurer paid the whole money inſured, which was 200*l.* In *April*, 1765, the iron trunk, which contained all the bullion, was fiſhed up; and thereby all the bullion was recovered
* P. 120 * without prejudice, and delivered to the defendant. The defendant's expence of ſalvage amounted to 63*l.* 8*s.* 2*d.* and deducting that ſum for ſalvage, the nett proportion of his ſhare came to 206*l.* 11*s.* 9*d.* The plaintiff's proportion thereof, in reſpect of his ſubſcription, amounted to 48*l.* 4*s.* which was paid into court.

The queſtion was, whether the plaintiff was entitled to recover?

Vide poſt. c. 14.

The court held, that this was a policy of a peculiar ſort; and that it was good within the exception of the 19th *George* 2. *c.* 37. which ſays, that certain policies of a particular form ſhall be void, except on effects from any port in *Europe*, or *America*, in the poſſeſſion of the crowns of *Spain* or *Portugal*. This is a mixed policy; partly a wager policy, partly an open one: it is a valued policy, and fairly ſo, without fraud or miſrepreſentation. Therefore the loſs having happened, the inſured is entitled to recover as for a total loſs. The inſurer agreed to the value; and cannot be allowed to diſpute it. The inſured has received the money for a total loſs: and there is no want of conſcience in retaining it. The caſes, cited at the bar, only tend to ſhew, that where it appears, *before* adjuſtment, to be but a *partial loſs*, the underwriter ſhall pay no more than the *real* damage: the reaſon of which deciſion is, that the inſured muſt ſhew the whole caſe, as it then ſtood. But in the preſent caſe, there was a total loſs *at the time* of the adjuſtment. The adjuſtment in this caſe makes an end of the queſtion. Here is a ſolemn abandonment, and a ſolemn agreement, "that the inſurers ſhall be content with ſalvage in ſuch "proportion as the ſum inſured bears to the whole intereſt." There was a total loſs at the time of the adjuſtment (which is the ſame as if the damages had then been recovered in an action.) Here is no ſort of fraud, nor any thing that is againſt any law: and to refund more than in that proportion would be contrary to the underwriter's own agreement. Therefore the

nett

nett proportion only, in reſpect to the plaintiff's ſubſcription after deduction of ſalvage, ought to be returned, and that is paid into court. The *poſtea* was ordered to be delivered to the defendant.

*CHAPTER THE SEVENTH. *P. 121

Of General or Groſs Average.

AVERAGE, in that ſenſe in which we are now to conſider it, ſignifies a contribution to a general loſs: but in order to ſatisfy the reader, it will be neceſſary to give a more particular deſcription of it. 3 Burr. 1555. 1 Magens 55

Whatever the maſter of a ſhip in diſtreſs, with the advice of his officers and ſailors, deliberately reſolves to do, for the preſervation of the whole, in cutting away maſts or cables, or in throwing goods overboard to lighten his veſſel, which is what is meant by jettiſon or jetſon, is in all places permitted to be brought into a general or groſs average: in which all who are concerned in ſhip, freight, and cargo, are to bear an equal, or proportionable part, of the loſs of what was ſo ſacrificed for the common welfare; and it muſt be made good by the inſurers in ſuch proportions, as they have underwritten. In the works of writers upon commercial affairs, we very often meet with the word contribution, alſo ſignifying the thing juſt deſcribed: and in a marine ſenſe, average and contribution are ſynonimous terms. Beawes 147.

This obligation, which, by the laws of all the maritime countries in *Europe*, binds the proprietor of the goods or ſhip ſaved to contribute to the relief of thoſe whoſe goods are thrown overboard, is founded on the great principle of diſtributive juſtice: for it would be hard that one man ſhould ſuffer by an act, which the common ſafety rendered neceſſary; and that thoſe who received a benefit from that act ſhould make no ſatisfaction to him who had ſuſtained the loſs.

This obligation, which is tacitly entered into by all who have property at ſea, was introduced by the *Rhodians*. Their laws * moſt equitably enacted, that all the property on board ſhould contribute to this neceſſary and general loſs; and in modern conſtitutions we find very little alteration in the doctrine of averages, from that eſtabliſhed at *Rhodes*. Similar regulations were made by the laws of *Wiſbuy*, and as I have already ſaid, they are now become general. From *Molloy* we learn, that the *Rhodian* laws upon this ſubject were introduced into *England* by *William* the Conqueror. Leg. Rhod. ſ. 2. art. 9. * P. 122 Laws of Wiſbuy, art. 2c. L. 2. c. 6. ſ. 3.

CHAP. VII.

Beawes is of opinion, that in order to make the act of throwing the goods overboard legal, three things muſt concur.

1ſt. That what is ſo condemned to deſtruction, be in conſequence of a deliberate and voluntary conſultation held between the maſter and men.

Beawes Lex Merc. 148.

2dly, That the ſhip be in diſtreſs, and ſacrificing a part be neceſſary in order to preſerve the reſt.

3dly, That the ſaving of the ſhip and cargo be actually owing to the means uſed with that ſole view.

But of theſe the firſt and third propoſitions may be doubted, as the ſecond point alone ſeems to be all that is neceſſary.

Laws of Wiſbuy, art. 20.

It appears alſo, by the laws of *Wiſbuy*, that in an emergency of ſuch a nature as to juſtify lightening the ſhip, it was neceſſary firſt to conſult the owner of the goods or the ſupercargo: but if they would not conſent, the merchandize might, notwithſtanding their refuſal, be ejected, if it appeared neceſſary to the reſt of the people on board; a regulation evidently founded in neceſſity, to prevent a ſordid individual from obſtructing a meaſure ſo eſſential to the general ſafety.

Laws of Oleron. art. 8.

Beawes 148. Molloy, l. 2. c. 6. ſ. 2.

If the ſhip ride out the ſtorm, and arrive in ſafety at the port of deſtination, the captain muſt make regular proteſts, and muſt ſwear, in which oath ſome of the crew muſt join, that the goods were caſt overboard for no other cauſe, but for the ſafety of the ſhip and the reſt of the cargo. And as the law has authorized ſuch proceedings, in theſe caſes of imminent neceſſity, it will protect thoſe who act *bonâ fide*, and will indemnify them againſt all conſequences. Thus in an action of treſpaſs againſt a man for throwing goods overboard, he pleaded ſpecially, that it was done in a ſtorm, in a caſe of neceſſity, * *navis levandæ cauſâ*; and if that act had not been done, that the paſſengers muſt all have periſhed. The court held, that the plea was good, and the defendant had judgment.

Mouſe's Caſe, 12 Co. 63.

* P. 123

It is evident from one of the rules above ſtated, that there can be no contribution without the ejection of ſome goods, and the ſaving of others: but it is not always neceſſary for the purpoſe of contribution, that the ſhip ſhould arrive at the port of deſtination.

Ord Lew. 14. tit. Contribu. art. 15. 16. Ord. of Hamb. 2 Mag 240. Ord. of Rotterdam. 2 Mageus 98. But ſee p. 122. 1 Mag. 56.

If the jettiſon does not ſave the ſhip, but ſhe periſh in the ſtorm, there ſhall be no contribution of ſuch goods as may happen to be ſaved; becauſe the object, for which the goods were thrown over-board, was not attained. But if the ſhip, being once preſerved by ſuch means, and continuing her courſe, ſhould afterwards be loſt, the property ſaved from the ſecond accident, ſhall contribute to the loſs ſuſtained by thoſe whoſe goods were caſt out upon the former occaſion.

Magens, in his preliminary Eſſay on Inſurances, advances a different doctrine, and contends, that if a ſhip be ſaved by throwing goods overboard, and afterwards periſh by another calamity,

calamity, the goods ſaved ſhall not contribute to the former loſs. He puts a caſe to illuſtrate his meaning; but the ordinances above referred to, as will appear from the abſtract of them in the preceding paragraph, directly contradict his poſitions, although he ſeems to have had thoſe ordinances in view when he advanced them. It was neceſſary to ſay thus much, becauſe the doctrines of ſuch an uſeful writer are often received implicitly; erroneous opinions are adopted and confirmed, becauſe they are not accurately examined: and the more reſpectable the writer is, the greater is the danger which is to be apprehended. But what is ſtill more remarkable, in the very next paragraph to that I laſt mentioned, he puts a ſimilar caſe, in which he admits that the goods ſaved ought to contribute. 1 Mag. 57

The writers upon this ſubject have ſtated with much minuteneſs and accuracy, the various accidents and charges, that will entitle the party ſuffering to call upon the reſt for a contribution. I doubt whether it be neceſſary to be ſo particular * in this place; becauſe, we may gather in general from the deſcription given of average at the beginning of this chapter, that all loſſes ſuſtained, and expences incurred voluntarily and deliberately, with a view to prevent a total loſs of the ſhip and cargo, ought to be equally borne by the ſhip and her remaining lading. Such for inſtance is the damage ſuſtained, in defending a ſhip againſt an enemy or pirate: ſuch is the expence of curing, and attendance upon the officers or mariners wounded in ſuch defence: and ſuch alſo is the ſum which the maſter may have promiſed to pay for the ranſom of his ſhip to any privateer or pirate, when taken. A maſter who has cut his maſt, parted with his cable, or abandoned any other part of the ſhip and cargo, in a ſtorm, in order to ſave the ſhip, is well entitled to this compenſation: but if he ſhould *loſe* them by the ſtorm, the loſs falls only upon the ſhip and freight; becauſe the tempeſt only was the occaſion of this loſs, without the deliberation of the maſter and crew; and was not done with a view to ſave the ſhip and lading. Upon the ſame principle it is, that by the naval laws of *Wiſbuy*, which in this reſpect, as well as in many others, have been adopted by modern ſtates, it was declared, that when a ſhip arrived at the mouth of a harbour, and the maſter, finding that his ſhip was too heavy laden to ſail up, was obliged to put part of the cargo into hoys and barges; the owners of the ſhip and of the goods that remained, were obliged to contribute, if the lighters periſhed. But if the ſhip ſhould be loſt, and the lighters ſaved, the owners of the goods ſo preſerved, were not to contribute to the proprietors of the ſhip and cargo loſt. The difference is this the lightening of the ſhip was an act of deliberation for the general benefit: whereas the circumſtance of the lighters being

* P. 124

Beawes Lex Merc. 148.

1 Mag. 64.

Beawes 148.

Art. 56.

Ordin. of France and Rotterdam 2 Magens 96. 183. Molloy tit. Average. ſ. 12.

1 Mag 56.

CHAP. VII.

ſaved, and the ſhip loſt, was accidental, no way proceeding from a regard for the whole.

It is not only the value of the goods thrown overboard that must be conſidered in a general average; but alſo the value of ſuch as receive any damage by wet, &c. from the jettiſon of the reſt,

Beawes 148. Molloy, ſ. 2. c. 6. ſ. 8.

Beawes 150. It is ſaid, that if a ſhip be taken by force, carried into ſome port, and the crew remain on board to take care of and reclaim her, not only the charges of reclaiming ſhall be brought

• P. 125 • into a general average; but the wages and expences of the ſhip's company during her arreſt, from the time of her capture, and being diſturbed in the voyage. In this idea *Magens* concurs, and aſſerts, that ſuch expences are allowed as average

2 Mag. 67. in *London* as well as elſewhere. He denies, however, and as it ſeems, juſtly denies, that an allowance would be made under general average, for ſailors wages and victuals, when they are under a neceſſity of performing quarantine, in which caſe the maſter would have been obliged to maintain and pay them, though his veſſel had arrived only in ballaſt. But at the ſame time he admits, that charges occurring by an extraordinary quarantine ſhall be brought into a general average.

It has however been a conſiderable queſtion, whether the extraordinary wages and victuals expended during the detention by a foreign prince not at war, ought to be brought into a general average, ſo as to charge the underwriter. *Magens* and *Beawes* differ upon the point; the latter being of opinion that it ſhould, the former that it ſhould not. In *England* there is no adjudged caſe, nor any regulation upon the ſubject; and therefore, the only mode by which this and ſimilar queſtions are to be decided, is to conſider, whether theſe expences were neceſſarily and unavoidably incurred, for the general ſafety of the ſhip and cargo.

Lateward v. Curling. G. H. Sittings after Trin. 1776. Lord *Mansfield* ſeems to have been of that opinion in an action upon a policy of inſurance on a *ſhip*. It was brought to recover the amount of wages and proviſions expended during the time the ſhip went from *Bengal* to *Bombay* to repair. His lordſhip, as he has frequently done ſince upon ſimilar occaſions, decided againſt the action, being an inſurance on the ſhip only, and the item in queſtion being ſailors wages. But his lordſhip ſaid, there may be caſes, where exceptions to the general rule ſhould be allowed; but in order to conſider a caſe as excepted, it muſt be an expence abſolutely neceſſary, and ſuch as could not be avoided, owing to ſome of the peril ſtated in the policy.

Vide ante p. p. 52. 54.

His lordſhip here ſeems to allude to a general average; but on a point, on which no authority can be adduced, I would not chuſe that Lord *Mansfield's* words ſhould be ſuppoſed to convey

* P. 126 * an idea, which perhaps the ſpeaker never intended. It does not

not become me to hazard an opinion; and therefore, I ſhall leave it as a matter undecided; only obſerving, that by the ordinances of *Lewis* the Fourteenth, the charges in ſuch a caſe ſhall be reputed general average, if the ſeamen be hired by the month; otherwiſe, if by the voyage. Tit. Average Art. 7

It may be proper before I cloſe this branch of my ſubject, to ſtate a paragraph, I have met with, which confirms the idea entertained by Lord *Manſfield*. "Though it muſt be noted, "ſays this author, that the charges of unloading a ſhip, to get "her into a river or port, ought not to be brought into a ge- "neral average; but they may when occaſioned by an indiſ- "penſable neceſſity to prevent the loſs of ſhip and cargo. As "when a ſhip is forced by a ſtorm to enter a port to repair the "damage ſhe has ſuffered, if ſhe cannot continue her voyage "without an apparent riſk of being loſt; in which caſe, the "wages and victuals of the crew are brought into an ave- "rage from the day it was reſolved to ſeek a port to refit the "veſſel, to the day of her departure from it, with all the char- "ges of unloading, reloading, anchorage, pilotage, and every "other expence incurred by this neceſſity." Beawes 150.

Since the firſt edition of this work, a queſtion nearly ſimilar came before the court of King's Bench, in which Mr. Juſtice *Buller* quoted the above paſſage from *Beawes*, as alſo the caſe of *Bateward* v. *Curling* in the preceding page: and although the learned judge thought it then unneceſſary to decide the point here agitated, yet the leaning of his mind ſeemed to be in favour of the affirmative. This, however, was held by the whole court, that where a ſhip is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and proviſions of *the workmen hired for the repairs*, become general average. De Coſta v. Newnham 2 Term Rep. 407

By the ancient laws of *Rhodes*, *Oleron* and *Wiſbuy*, the ſhip, and all the remaining goods ſhall contribute to the loſs ſuſtained. The moſt valuable goods, though their weight ſhould have been incapable of putting the ſhip in the leaſt hazard, as diamonds or precious ſtones, muſt be valued at their juſt price in this contribution, becauſe they could not have been ſaved to the owners but by the ejection of the other goods. Neither the perſons of thoſe in the ſhip, nor the ſhip proviſions, nor reſpondentia bonds, ſuffer any eſtimation; nor does wearing apparel in cheſts and boxes, nor do ſuch jewels as belong to the perſon merely; but if the jewels are a part of the cargo, they muſt contribute. De leg. Rhod. ſ. 2. art. 8. Oler art 8. Wiſb art. 20. Molloy. l. 2. c. 6. ſ. 4. * P. 127 Vide poſt c. 21. Joycev. Williamſon 1 Mag. 63

Thoſe who carry jewels by ſea ought to communicate that circumſtance to the maſter; becauſe the care of them will be increaſed in proportion to their worth, to prevent their being thrown overboard promiſcuouſly with other things: and hence their preſervation will be a common benefit.

Both

CHAP. VII.

Both by law and cuſtom, the wages of ſailors are not to contribute to the general loſs; a proviſion intended to make this deſcription of men more eaſily conſent to a jettiſon, as they do not then riſk their all, being ſtill aſſured that their wages will be paid.

1 Mag 71.

The way of fixing a right ſum, by which the average ought to be computed, can only be, by examining what the whole ſhip, freight and cargo, if no jettiſon had been made, would have produced neat, if they had all belonged to one perſon, and been ſold for ready money. And this is the ſum whereon the contribution ſhould be made, all the particular goods bearing their nett proportion.

1 Mag 69.

In no reſpect whatever do the ordinances of foreign ſtates differ ſo much, as in the manner of ſettling the contribution of the ſhip and freight. In ſome places, the ſhip contributes for the whole of her value and freight; in others, for the half of her value, and one third of her freight: and again, in others, both ſhip and freight are to contribute for one half. By the laws of *Koningſberg*, *Hamburgh*, and *Copenhagen*, the ſhip is to contribute for the whole of her value and freight: They alſo declare, that the value of the ſhip ſhall be that which ſhe was worth when ſhe arrived; and that from the freight a deduction ſhall be made of the men's wages, pilotage, and ſuch other charges, as come under the name of petty average, of which it is cuſtomary every where, as we have before obſerved, for the cargo to bear two thirds, and the ſhip one.

Crd of Genoa and France.

2 Mag. 207. 287. 339.

Vide the laſt chapter.

The *Engliſh* writers upon commerce are totally ſilent in this reſpect; and therefore cuſtom muſt be our guide: and I think * from that we may collect, that the ſhip, freight, (*a*) and cargo, are to bear an equal and proportional part of what was ſo ſacrificed for the common good.

* P. 128

The ſea laws of different countries vary no leſs than upon the former queſtion, in fixing at what prices goods thrown overboard ſhall be eſtimated, and for what value thoſe ſaved are to contribute.

2 Mag. 100. 285. 339.

By the ordinances of *Rotterdam*, *Stockholm*, and *Copenhagen*, if the accident, which occaſioned the general average, happened before half the voyage was performed, the jettiſon was to be eſtimated at prime coſt; but if after that period, then at the price for which ſuch goods would ſell, at the place of diſcharge, freight, duties, and ordinary charges deducted. That diſtinction is now, however, exploded in *England*, and the cuſtom has become general of eſtimating the goods ſaved and loſt, at the price for which the goods ſaved were ſold; freight and all other

Molloy. tit. Ayer. l. 15.

(*a*) It was lately held by the whole court of King's Bench, that freight muſt contribute to a general Average. *Da Coſta* v. *Newnham*. 2 Term R. 407.

charges

charges being first deducted. This rule is agreeable to the marine laws of *Wisbuy*, which declare, that the goods thrown overboard shall be brought into a gross average, and shall be rated at the same price for which other merchandize of the same sort, preserved from the sea or enemy, was sold. This custom mentioned by *Molloy* was certainly new in *England* at the time he wrote; for it appears by *Malyne*, that in 1622, the distinction was observed of estimating the goods at prime cost, if the jettison happened, before half the voyage was performed; and if after, at the price the rest of the goods sold for, at the place of discharge. However, *Molloy* is a more modern authority; and *Magens* says, that the prevailing mode of settling averages now adopted in *England* is conformable to that rule, which has abolished the distinction. CHAP. VII. Leg. Wisb. art. 20. Malyne Lex Merc. 111. part c. 26.

Gold, silver and jewels, at most places, contribute to a general average, according to their full value, and in the same manner as any other species of merchandize. It has been said, that an immemorial custom has prevailed at *Amsterdam*, that gold * and silver shall only contribute for half their value: the reason for such a custom, one is at a loss to conjecture. In *England* no such custom prevails, but money and jewels must fall into the general average at their full price: and a modern writer assures us, that the practice was such in *London* when he wrote: and such, I believe it to be at this day. 1 Mag. 26 * P. 129 Molloy, tit. Average, l. 4. 1 Mag. 62

In a late case, the doctrine here advanced was mentioned and confirmed by Mr. Justice *Buller*, as clear law. Peters v. Milligan. Sittings at Guildhall, after Michaelmas, 1787.

The contribution is in general not made till the ship arrive at the place of delivery; but accidents may happen, (*a*) which may cause a contribution before she reach her destined port. Thus when a vessel has been obliged to make a jettison, or, (*b* by the damages suffered, soon after sailing, is obliged to return to her port of discharge; the necessary charges of her repairs, and the replacing the goods thrown overboard, may then be settled by a general average. (*a*) Roccus de Navibus Not. 96. (*b*) 1 Mag. 60.

Thus I have endeavoured to lay before the reader an idea of what is meant by average; and, in order to do that more distinctly, I have defined what average is; I have shewn its origin; and what the necessary requisites are to render the act, whence averages arise, legal. I then stated in general what accidents or expences would authorize the sufferer to call for a contribution; the different kinds of property that were subject to such contribution; and lastly, the mode by which the value of this property was to be ascertained.

It only remains now to state, that the insurers are liable to pay the insured for all expences arising from general average, in proportion to the sums they have underwritten. *Roccus* says, " *Jactu facto, ob maris tempestatem, pro sublevanda navi, an te* " *neantur assecuratores ad solvendum æstimationem rerum jac-* " *tarum* Roccus de assecurationibus Not. 26.

CHAP. VIII.

" *tarum domino ipſarum? Dix eos non teneri, quia pro rebus* " *jactis fit contributio, inter omnes merces habentes in illa navi* " *pro ſolvendo pretio domino ipſarum, et ideo ſi aſſecuratus re-* " *cuperat pretium rerum jactarum, non potest agere contra aſ-* " *ſecuratores; tamen tenentur aſſecuratores ad reficiendum illam* " *ratam et portionem, quam ſolvit aſſecuratus in illam contri-*
*P. 130 " *butionem* * *faciendo, inter omnes, habentes merces in illa navi,* " *quæ portio cum non recuperetur ab aliis, habetur pro deperdita,* " *et proinde ad illam portionem tenenter aſſecuratores.*"

The opinion of this learned civilian is agreeable to the laws of all the trading powers on the continent of *Europe*, as well as to thoſe of *England*, where the inſurer, by his contract, engages to indemnify againſt all loſſes ariſing from a general average.

*P. 131 * CHAPTER THE EIGHTH.

Of Salvage.

SALVAGE is ſo neceſſarily connected with the two former chapters, that it will be proper to take it into conſideration here, before we proceed to the other parts of this enquiry.

Salvage is an allowance made for ſaving a ſhip, or goods, or both from the dangers of the ſeas, fire, pirates, or enemies: and it is alſo ſometimes uſed to ſignify the thing itſelf, which is ſaved; but it is in the former ſenſe only, in which we are at preſent to conſider it.

Brawes Lex. Merc. 146.

The propriety and juſtice of ſuch an allowance muſt be evident to every one; for nothing can be more reaſonable than that he, who has recovered the property of another from imminent danger, by great labour, or perhaps at the hazard of his life, ſhould be rewarded by him, who has been ſo materially benefitted by that labour. Accordingly, all maritime ſtates, from the *Rhodians* down to the preſent time, have made certain regulations, fixing the rate of ſalvage in ſome inſtances, and leaving it, in others, to depend upon the particular circumſtances.

Kaim's Princ. of Eq. Introduct. p. 6.

Leg. Rhod. ſ. 2. art. 65. 46. 47.

The law of *England*, the deciſions of which are not ſurpaſſed by thoſe of any other nation, in juſtice and humanity, was not backward in adopting a doctrine ſo equitable in its nature, and ſo beneficial to thoſe whoſe property was endangered.

Thus in an action of trover, the deſendants pleaded, that the goods, for which the action was brought, were in a ſhip, which took fire, and that they hazarded their lives to ſave them: but that they were ready to deliver the goods, if the plaintiff would pay 4l. for ſalvage. The court upon a general demurrer to this plea,

Hartfort v. Jones. 1 Ld. Raym. 393. 2 Salk. 654.

plea, were obliged to give judgment for the plaintiff, becauſe the ſpecial plea did not confeſs a converſion. But upon the general point, for which this caſe is cited, Lord Chief Juſtice *Holt* held * that the defendants might retain the goods till payment of the ſalvage, as well as a taylor, an oſtler, or a common carrier: and ſalvage is allowed by all nations; it being reaſonable, that a man ſhould be rewarded, who hazards his life in the ſervice of another. Therefore his lordſhip, in favour of ſo juſt a claim, allowed the defendant to waive his ſpecial plea, and plead the general iſſue.

* P. 132

As the propriety of ſuch an allowance is admitted by all, the only difficulty that can ariſe upon the ſubject is, to aſcertain in what proportions theſe gratuities and rewards muſt be allowed.

The laws of *Rhodes* fixed the rate of ſalvage in ſeveral inſtances, ſometimes giving for ſalvage one-fifth of what was ſaved; at other times only a tenth; and at others, one half. The regulations of *Oleron* left it more unſettled, and declared, that the courts of judicature ſhould award to the ſalvers, ſuch a proportion of the goods ſaved, as they ſhould think a ſufficient recompenſe for the ſervice performed, and the expence incurred. Almoſt every ſtate has regulations on this head peculiar to itſelf; and the legiſlature of this country has by various ſtatutes expreſſed its ideas upon the ſubject. I ſhall firſt conſider what rule it has eſtabliſhed in caſes of wreck, and then what the rate of ſalvage is in caſes of recapture.

Vide the paſſages laſt cited.

Leg. Oler. art. 4.

When a ſhip has been wrecked, the law of *England* has followed the laws of *Oleron* in declaring, that *reaſonable* ſalvage only ſhall be allowed. But the ſtatute will beſt ſhew the idea of the legiſlature.

It appears from the preamble, that the infamous practices, which a former ſtatute 27 *Edward* 3. *c.* 13. had endeavoured to ſuppreſs, of plundering thoſe ſhips which were driven on ſhore, and ſeizing whatever could be laid hold of as lawful prize, ſtill continued; or that if the property were reſtored to the owners, the demand for ſalvage was ſo exorbitant, that the inevitable ruin of the trader was the immediate conſequence. The ſtatute, in order to prevent theſe miſchiefs in future, enacted, that if a ſhip was in danger of being ſtranded, or run aſhore, the ſheriffs, juſtices, mayors, conſtables, or officers of the cuſtoms, neareſt the * place of danger, ſhould, upon application made to them, ſummon and call together as many men as ſhould be thought neceſſary to the aſſiſtance, and for the preſervation of ſuch ſhip in diſtreſs and her cargo; and that if any ſhip, man of war, or merchantman, ſhould be riding at anchor near the place of danger, the conſtables and officers of the cuſtoms might demand of the ſuperior officers of ſuch ſhip, aſſiſtance by his boats and ſuch hands

12 An ſtat. 2. c. 18. Sect. 1.

* P. 133

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hands as could be ſpared: and that if the ſuperior officer ſhould refuſe to grant ſuch aſſiſtance, he ſhould forfeit 100*l.*

Sect. 2.

Then follows the ſection reſpecting ſalvage. "And for the "encouragement of ſuch perſons as ſhall give their aſſiſtance "to ſuch ſhips or veſſels, ſo in diſtreſs as aforeſaid, be it enact- "ed, that the ſaid collectors of the cuſtoms, and the maſter "and commanding officer of any ſhips or veſſels, and all others, "who ſhall act or be employed in the preſerving of any ſuch "ſhip or veſſel in diſtreſs, or their cargoes, ſhall, within thirty "days after the ſervice is performed, be paid *a reaſonable re-* "*ward* for the ſame, by the commander, maſter, or other ſu- "perior officer, mariners, or owners of the ſhip or veſſel ſo "in diſtreſs, as aforeſaid, or by the merchant whoſe veſſel or "goods ſhall be ſo ſaved; and in default thereof, the ſaid ſhip "or veſſel ſo ſaved ſhall remain in the cuſtody of the officers of "the cuſtoms until all charges are paid, and until the officers "of the cuſtoms, and the maſter or other officers of the ſhip "or veſſel, and all others employed in the preſervation of the "ſhip, ſhall be *reaſonably gratified* for their aſſiſtance and trou- "ble, or good ſecurity given for that purpoſe, to the ſatisfac- "tion of the parties that are to receive the ſame: and if any "diſagreement ſhall take place between the perſons, whoſe "ſhips or goods have been ſaved, and the officer of the cuſ- "toms, touching the monies deſerved by any of the perſons ſo "employed, it ſhall be lawful for the commander of the ſhip "or veſſel ſo ſaved, or the owner of the goods, or the mer- "chant intereſted therein, and alſo for the officer of the cuſ- "toms, or his deputy, to nominate three of the neigh- "bouring juſtices of the peace, who ſhall thereupon adjuſt "the *quantum* of the monies or gratuities to be paid to the "ſeveral perſons acting or being employed in the ſalvage of

* P. 134 "* the ſaid ſhip, veſſel, or goods: and ſuch adjuſtments ſhall "be binding upon all parties, and ſhall be recoverable in an "action at law: and in caſe it ſhall ſo happen, that no perſon "ſhall appear to make his claim to all or any of the goods "that ſhall be ſaved, that then the chief officer of the cuſtoms "of the neareſt port to the place where the ſaid ſhip or veſſel "was ſo in diſtreſs, ſhall apply to three of the neareſt juſtices "of the peace, who ſhall put him or ſome other reſponſible "perſon in poſſeſſion of the ſaid goods, ſuch juſtices taking an "account in writing of the ſaid goods to be ſigned by the ſaid "officers of the cuſtoms: and if the ſaid goods ſhall not be "legally claimed within the ſpace of twelve months next en- "ſuing, by the rightful owner thereof, then public ſale ſhall "be made thereof, and if periſhable goods, forthwith to be "ſold, and after all charges deducted, the reſidue of the "monies ariſing from ſuch ſale, with a fair and juſt account "of the whole, ſhall be tranſmitted to her majeſty's Exche-

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" quer, there to remain for the benefit of the rightful owner, " when appearing, who upon an affidavit, or other proof " made of his or their right or property thereto, to the ſatis- " faction of one of the barons of the coif of the Exchequer, " ſhall, upon his order, receive the ſame out of the Exchequer "

The ſtatute then goes on to declare, that any other perſons, than thoſe mentioned in the preceding clauſe, endeavouring to enter ſuch ſhip or veſſel without the permiſſion of the ſuperior officer of the ſhip, or of the officer of the cuſtoms, *&c.* or moleſting or hindering them in the preſervation of the ſhip, or defacing the marks of the goods on board ſuch ſhip, ſhall make double ſatisfaction to the party grieved, or, on default thereof, ſhall be ſent to the houſe of correction for twelve calendar months: and that it ſhall be lawful for the officers of the ſhip to repel by force perſons ſo endeavouring to enter without leave. Sect. 3.

It is alſo enacted, that if any goods, ſtolen from ſuch ſhip, ſhall be found on any perſon, they ſhall be delivered up to the true owner; or, in default, ſuch perſon ſhall pay treble the value. Sect. 4.

* The next ſection declares, that any perſon, boring holes in a ſhip in diſtreſs, or ſtealing a pump belonging thereto, ſhall be guilty of felony, without benefit of clergy. * P. 135 Sect. 5.

This act was made perpetual by the 4 *Geo.* 1. *c*, 12.; and as far as relates to our preſent ſubject, we can collect, that in caſes of wreck, the rate of ſalvage is not fixed, but muſt be *reaſonable*; that is, it muſt be a ſufficient recompence to thoſe, who have encountered dangers for the preſervation of the ſhip and cargo, regard at the ſame time being had to the circumſtances of the owner of the property ſaved: and what ſhall be a ſufficient recompence is to be aſcertained by three juſtices of the peace.

Notwithſtanding this ſalutary law had paſſed, the enormities complained of by the ſtatute of queen *Anne* ſtill continued, to the diſgrace of humanity and a civilized people; upon which the legiſlature were again obliged to interpoſe by a ſubſequent ſtatute, which I ſhould perhaps not have mentioned, had it not contained ſome additional regulations reſpecting ſalvage. 26. Geo. 2 c. 18.

The ſtatute ordains, that perſons, convicted of ſtealing goods from a ſhip wrecked, or in diſtreſs, or of obſtructing the eſcape of any perſon from a wreck, or of putting out falſe lights to lead ſuch ſhip into danger, ſhall ſuffer as felons without benefit of clergy. But where goods of ſmall value ſhall be ſtolen, without any circumſtances of cruelty, the offender may be indicted for petty larceny. Juſtices of the peace, upon information of ſhipwrecked goods being ſtolen or concealed, are empowered to iſſue ſearch warrants; and the perſons in whoſe cuſtody they may be found, refuſing to deliver them Sect. 1. Sect. 2. Sect. 3.

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on demand, or to give a ſatisfactory account how they became poſſeſſed thereof, ſhall be committed to the common gaol for ſix months, or until payment of the treble value of ſuch goods.

Sect. 4. Goods offered to ſale, ſuſpected of being ſhipwrecked, are to be ſtopped; and notice ſhall be immediately given to a juſtice of the peace, and if the perſon offering the ſame to ſale cannot make out the property to be lawfully in him, the goods ſhall be returned to the owner, *upon a reaſonable reward for ſuch ſeizure, (to be aſcertained by the juſtice:)* and the offender ſhall be committed to the common gaol for ſix months, or until payment of the treble value of the ſaid goods.

* P. 136. Sect. 5. * And be it further enacted, "that in caſe any perſon or perſons, not employed by the maſter, mariners or owners, or "other perſons lawfully authorized in the ſalvage of any ſhip "or veſſel, or the cargo or proviſion thereof, ſhall, in the abſence of the perſons ſo employed and authorized, ſave any "ſuch ſhip, veſſel, goods, or effects, and cauſe the ſame to be "carried, for the benefit of the owners or proprietors, into "port, or to any near adjoining cuſtom-houſe, or other place "of ſafe cuſtody, immediately giving notice thereof to ſome "juſtice of the peace, magiſtrate, or cuſtom houſe or exciſe-"officer; or ſhall diſcover to ſuch magiſtrate, or officer, where "any ſuch goods or effects are wrongfully bought, ſold, or "concealed, then *ſuch perſon or perſons ſhall be entitled to a "reaſonable reward for ſuch ſervices,* to be paid by the maſters "or owners of ſuch veſſels or goods, and to be adjuſted in "caſe of diſagreement about the *quantum*, in like manner as "the ſalvage is to be adjuſted and paid, by virtue of a ſtatute Vide ſupra. "made in the 12th of queen *Anne*."

Sect. 6. "And be it further enacted, that for the better aſcertaining "the ſalvage to be paid in purſuance of the preſent act, and the "act before mentioned, and for the more effectual putting the "ſaid acts in execution, the juſtice of the peace, mayor, bailiff, "collector of the cuſtoms, or chief conſtable, who ſhall be "neareſt to the place where any ſhip, goods, or effects, ſhall "be ſtranded or caſt away, ſhall forthwith give publick notice "for a meeting to be held as ſoon as poſſible of the ſheriff or "his deputy, the juſtices of the peace, mayors, or other chief "magiſtrates of towns corporate, coroners or commiſſioners "of the land tax, or any five or more of them, who are hereby "empowered and required to give aid in the execution of this "and the ſaid former act, and to employ proper perſons for the "ſaving of ſhips in diſtreſs, and ſuch ſhips, veſſels, and effects, "as ſhall be ſtranded, or caſt away; and alſo to examine perſons upon oath, touching or concerning the ſame, or the "ſalvage thereof, and to adjuſt the *quantum* of ſuch ſalvage, "and diſtribute the ſame among the perſons concerned in ſuch "ſalvage, in caſe of diſagreement among the parties, or the

"ſaid

" ſaid perſons; and that every ſuch magiſtrate, *&c.* attending " and acting at ſuch meeting, ſhall be paid four ſhillings a day " * for his expences in ſuch attendance out of the goods and " effects ſaved by their care or direction." * P. 137.

" Provided always, that if the charges and rewards for ſal- Sect. 7.
" vage, directed to be paid by the former ſtatute, and by this " act, ſhall not be fully paid, or ſufficient ſecurity given for " the ſame, within forty days next after the ſaid ſervices per- " formed, then it ſhall be lawful for the officer of the cuſtoms " concerned in ſuch ſalvage, to borrow or raiſe ſo much money " as ſhall be ſufficient to ſatisfy and pay ſuch charges and re- " wards, or any part thereof, then remaining unpaid, or not " ſecured as aforeſaid, by or upon one or more bill or bills of " ſale, under his hand and ſeal, of the ſhip or veſſel, or cargo " ſaved, or ſuch part thereof, as ſhall be ſufficient, redeemable " upon payment of the principal ſum borrowed, and intereſt " for the ſame, at the rate of 4 *per cent. per annum.*"

The act alſo declares, that the commiſſioners of the land tax, Sect. 9.
the deputy-ſheriff, the coroner, and the officers of exciſe in each county, ſhall be the proper officers for putting theſe acts in execution, together with thoſe perſons reſpectively named in the act of queen *Anne.* In the Cinque Ports however, the execu- Sect. 10.
tion of theſe acts is entruſted to the lord warden of the Cinque Ports, the lieutenant of *Dover* Caſtle, the deputy warden of the Cinque Ports, the judge official and commiſſary of the court of Admiralty of the Cinque Ports, two ancient towns, and the members thereof, and to all and every other perſon and perſons appointed, or to be appointed by the lord warden of the Cinque Ports.

The ſtatute proceeds to ſay, that perſons convicted of aſ- Sect. 11. and
ſaulting any magiſtrate or officer, when in the exerciſe of his 12.
duty reſpecting the preſervation of any ſhip, veſſel, goods or effects, ſhall be tranſported for ſeven years; and the juſtices, in the abſence of the ſheriff, may take a ſufficient force with them to repreſs violence. It directs in the laſt place, that the Sect. 15.
officer of the cuſtoms who ſhall act in preſerving any ſhip or veſſel in diſtreſs, or the cargo thereof, ſhall cauſe all perſons belonging to the ſaid ſhip or veſſel, and others who can give any account thereof, or of the cargo thereof, to be examined upon oath before ſome juſtice of the peace, as to the name or * deſcription of the ſaid ſhip or veſſel, and the names of the * P. 138.
maſter, commander, or chief officer, and owners thereof, and of the owners of the ſaid cargo, and of the ports or places from, or to which the ſaid ſhip or veſſel was bound, and the occaſion of the ſaid ſhip's diſtreſs; which examination the juſtices are to take down in writing, and they ſhall deliver a true copy thereof, together with a copy of the account of the goods, to the officer of the cuſtoms, who ſhall tranſmit the

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ſame to the ſecretary of the Admiralty for the time being, that he may publiſh the ſame, or ſo much thereof, in the *London* Gazette, as ſhall be neceſſary for the information of perſons intereſted therein This act is not to extend to *Scotland*.

Thus anxiouſly has the legiſlature provided for the preſervation of property wrecked, thereby diminiſhing thoſe calamities which muſt unavoidably happen to all concerned in foreign commerce; and with no leſs anxiety and wiſdom, it has appointed certain magiſtrates to aſcertain what ſhall be a ſufficient allowance for the ſalvage of a ſhip or goods in caſes of wreck. The neceſſity of leaving the *quantum* to the arbitration of proper perſons, to be decided according to the circumſtances of each caſe, is obvious; becauſe it is impoſſible to ſuppoſe two inſtances of ſuch a calamity ſo ſimilar to each other, that the trouble, danger and expence of both ſhall be exactly equal. It would be contrary, therefore, to the firſt principles of juſtice to decide, that the ſame ſum ſhould be the allowance, or recompence for every poſſible caſe of ſalvage. For inſtance, if a ſhip be found adrift at ſea, having been abandoned by the maſter and crew, it ſeems reaſonable, that the allowance for ſalvage ſhould be greater than in a caſe where a man merely picks up goods caſt upon the ſhore, and carries them to a place of ſecurity. Thus much for ſalvage in caſe of a wreck.

Vide ante, c. 4. p. 71.

We have formerly ſeen, that when the ſhips or goods of *Britiſh* ſubjects were retaken from an enemy, the original owner was entitled, by the marine law, to have them reſtored, upon paying to the recaptors a reaſonable ſalvage, provided the recapture was before condemnation. It was alſo obſerved, that the ſtatute law had extended the right of the original owner; ſo that he was entitled to have his ſhip and goods reſtored to

* P. 139

* him, whether they were retaken after condemnation or before, however diſtant the time of recapture might be from that of the original taking. The ſame ſtatute has alſo fixed the preciſe rate of ſalvage, which, in the various inſtances mentioned in the act, the recaptors ſhall be entitled to demand.

13 Geo. 2. c. 4. ſ. 18. 29 Geo. 2. c. 34. ſ. 24

"Be it enacted, that if any ſhip, veſſel, or boat, taken as "prize, or any goods therein, ſhall appear and be proved in "the Court of Admiralty, to have belonged to any of his "majeſty's ſubjects of *Great Britain* or *Ireland*, or any of "the dominions and territories continuing under his majeſty's "protection and obedience, which were before taken or ſur-"prized by any of his majeſty's enemies, and again ſurprized "and retaken by any of his majeſty's ſhips of war, or any "private man of war, or other ſhip, veſſel, or boat, under "his majeſty's protection or obedience, that then ſuch ſhips "veſſels, boats and goods, and every ſuch part and parts "thereof as aforeſaid, belonging to ſuch his majeſty's ſubjects,

"ſhall

" ſhall be adjudged to be reſtored, and ſhall be, by decree of
" the ſaid Court of Admiralty, accordingly reſtored to ſuch
" former owner or proprietor or proprietors, he or they paying
" for and in lieu of ſalvage, if taken by one of his majeſty's
" ſhips of war, *an eighth part of the true value of the ſhips,*
" *veſſels, boats and goods, reſpectively ſo to be reſtored*; which
" ſalvage ſhall be anſwered and paid to the captains, officers and
" ſeamen in the ſaid man of war, to be divided as before
" in this act is directed: and if taken by a privateer or other
" ſhip, veſſel, or boat, after having been in the poſſeſſion of
" the enemy, twenty-four hours, *one eighth part* of the true
" value of the ſaid ſhips, veſſels, boats and goods: and if
" above twenty-four hours, and under forty-eight hours, *a*
" *fifth part thereof:* and if above forty eight hours, and under
" ninety-ſix hours, *a third part thereof:* and if above ninety-
" ſix hours, *a moiety thereof:* all which payments to be made
" to any privateer, or other ſhip, veſſel or boat, ſhall be without
" any deductions. And if ſuch ſhip ſo retaken, ſhall appear to
" have been, after the taking by the enemy, by them ſet forth
" as a man of war, the former owners or proprietors, to whom
" the ſame ſhall be reſtored, ſhall be adjudged to pay, and
" ſhall pay for ſalvage, the full moiety of the true value of the
" ſaid ſhip ſo taken and reſtored, without deduction."

* Parliament has, by theſe ſtatutes, thus fixed and aſcertained * P. 140
the rate of ſalvage, in caſe of a recapture, equitably proportioning the amount of the reward to the length of time the ſhip or goods have been in the poſſeſſion of the enemy; becauſe the longer they remain in the hands of the enemy, ſo much the leſs is the hope of recovery. At the ſame time, however, the ſtatute has fixed a boundary, beyond which the allowance ſhall not paſs; namely, that in no caſe whatever, ſhall the recaptors be entitled to more than a moiety of the property thus reſcued from the enemy.

It is ſaid in the ſtatute, that the ſalvage ſhall be a proportion of the ſhips and goods ſo reſtored: but a writer upon mercantile law obſerves, that the wearing apparel of the maſter and ſeamen are always excepted from the allowance of ſalvage. Beawes Lex Merc. 147.

The ſtatute has alſo ſaid, it muſt be a fifth, or a third, &c. of the *true value*. Now the valuation of a ſhip, in order to aſcertain the rate of ſalvage, may be determined by the policy of inſurance, if there is no reaſon to ſuſpect ſhe is undervalued; and the ſame rule may be obſerved as to goods where there are policies upon them. If that, however, ſhould not be the caſe, the ſalvers have a right to inſiſt upon proof of the real value, which may be done by the merchant's invoices, and they muſt be paid for accordingly. Beawes 147

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The only queſtion then is, how far the inſurers are affected by this allowance of ſalvage. By their own contract, they expreſsly agree to indemnify the inſured againſt ſuch charges. "And in caſe of any loſs or misfortune, it ſhall be lawful for "the aſſured, their factors, ſervants, and aſſigns to ſue, labour "and travel for, in and about the defence, ſafeguard, and re-"covery of the ſaid goods and merchandizes, and ſhip, &c "or any part thereof, without prejudice to this inſurance; to "the charges whereof we the aſſurers will contribute, each "one according to the rate or quantity of his ſum herein "aſſured."

Vide the Appendix, N. I.

In the caſe of *Mitchell* v. *Edie*, (1 Term, Reports 608), Mr. Juſtice *Aſhhurſt* ſaid, it ſeemed to him, that the meaning of this clauſe was, that till the aſſured have been informed of what has happened, and have had an opportunity of exerciſing their own judgment, no act done by the maſter ſhall prejudice their right of abandonment.

* P. 141

In order to entitle the inſured to recover the expences of ſalvage, it is not neceſſary to ſtate them in the declaration, as a ſpecial breach of the policy; becauſe an inſurance is againſt all accidents, and ſalvage is an immediate and neceſſary conſequence of ſome of thoſe ſtated in a policy.

Thus in an action on a policy of inſurance, for inſuring goods on the ſhip A. the plaintiff declared, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled: the evidence was, that many of the goods were ſpoiled, but ſome were ſaved. The queſtion was, whether the plaintiffs might give in evidence, the expences of ſalvage, that not being particularly ſtated in the declaration, as a breach of the policy.

Carey v. King. Caſes in B. R. temp. Hardwicke, 304.

Lord *Hardwicke*.—I think they may give it in evidence, for the inſurance is againſt all accidents. The accident laid in this declaration is, that the ſhip ſunk in the river: it goes on and ſays, that by reaſon thereof the goods were ſpoiled. That is the only ſpecial damage laid; yet it is but the common caſe of a declaration that lays a ſpecial damage, where the plaintiff may give in evidence any damage that is within his cauſe of action. It was objected, that ſuch a breach of the policy ſhould be laid, that the inſurer may have notice to defend it. Now it is ſo in this caſe, for they have laid the accident, which is ſufficient notice, becauſe it muſt of courſe follow, that ſome damage did happen.

But although the inſured may recover from the inſurer the expences of ſalvage; yet he ſhall only be intitled to an indemnity, and ſhall not receive a double ſatisfaction for the ſame loſs. Thus if the inſurer ſhould have paid to the inſured the expences ariſing from ſalvage; and afterwards on account of ſome particular circumſtances, the loſs ſhould be repaired by

ſome

ſome unexpected means, the inſurer ſhall ſtand in the place of the inſured, and receive the ſum thus paid to atone for the loſs.

* It was ſo determined in a caſe before Lord *Hardwicke* in Chancery. The king having granted general letters of repriſal on the *Spaniards* for the benefit of his ſubjects, in conſideration of the loſſes they ſuſtained by unjuſt captures, the commiſſioners would not ſuffer the inſurers to make claim to part of the prizes, but the owners only; although they were already ſatisfied for their loſs by the inſurers, who thereupon brought the preſent bill. The Lord Chancellor was of opinion, that the plaintiffs had the plaineſt equity that could be. The perſon originally ſuſtaining the loſs was the owner; but after ſatisfaction made to him, the inſurer becomes the owner. No doubt, but from that time, as to the goods themſelves, if reſtored in ſpecie, or compenſation made for them, the inſured ſtands as a truſtee for the inſurer, in proportion for what he paid; although the commiſſioners did right in avoiding being entangled in accounts, and in adjuſting the proportion between them. Their commiſſion was limited in time; they ſee who was owner; nor was it material to them, to whom he aſſigned his intereſt, as it was in effect after ſatisfaction made.

* P. 142

Randal v. Cockran. 1 Vez. 98.

Caſes, however, may, and do frequently ariſe, where the ſalvage is ſo high, the other expences are ſo great, and the object of the voyage is ſo far defeated, that the inſured is allowed, by the laws of all trading nations, to abandon his intereſt in the property ſaved to the inſurer, and to call upon him to contribute, as if a total loſs had actually happened. What circumſtances ſhall be deemed ſufficient to juſtify the inſured in making ſuch an abandonment, will be the ſubject of the following chapter.

* CHAPTER THE NINTH.

* P. 143

Of Abandonment.

WE have formerly ſeen, that the inſured, before he can demand a recompenſe from the underwriter for a total loſs, muſt cede or abandon to him his right to all the property that may chance to be recovered from ſhipwreck, capture, or any other peril, ſtated in the policy. It has alſo been obſerved, and from the preceding ſentence it is obvious, that when we ſpeak of a total loſs, with reſpect to inſurances, we do not always mean, that the thing inſured is abſolutely loſt and deſtroyed: but that by ſome of the uſual perils, it is become of ſo little value, as to entitle the inſured to call upon the underwriter to accept of what is

Chap. 4. p. 82. Pothier's Traité du contrat d'Aſſurance 133

Vide c. 6. p. 98.

 ſaved,

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saved, and to pay the full amount of his insurance, as if a total loss had actually happened. Indeed, the word abandonment conveys the idea, that the whole property is not lost; for it is impossible to cede or abandon that which does not exist. When the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantages resulting from that situation.

See Randall v. Cockran 1 Vez. 98.

From what has been said then, it appears, that abandonment dates its origin from the period at which the contract of insurance was itself introduced; because insurance being a contract of indemnity, the insured can recover no more than the amount of the loss actually sustained: but if he were allowed to recover for a total loss, and might also retain the property saved, he would be a considerable gainer, which the law will not allow. Accordingly we find, that the doctrine of abandonment has obtained a place in the laws of all the maritime nations in the world, where insurance has been known: and in all those laws the definition of it is the same, namely, that when any goods or ships, that are insured, happen to be lost, taken, or spoiled, the insured is obliged to abandon such goods or ships for the benefit of the insurers, before he can demand any satisfaction from them. In this respect also, they seem to be agreed, that when an abandonment is made, it must be a total, not a partial one; that is, one part of the property insured shall not be retained, and the other part abandoned; a regulation certainly founded in justice.

France, Rotterdam, Bilboa, Middleburgh.

* P. 144

Pothier 133. Ord. of Lew. 14. art 47. Ord. of Bilboa 32.

The propriety and justice of abandoning in certain cases to the insurers being apparent, it will be proper to consider in what cases, and under what circumstances, the insured is intitled to exercise this power: for although in all cases the insured has a right to say, he will not abandon; yet he cannot at his pleasure harrass the insurer, by saying he will abandon, and thereby turn that, which, in its own nature, was only a partial, into a total loss.

2 Burr. 697.

In questions of this nature, the opinion of learned foreigners must always have weight: because they are not questions of positive regulation, or municipal law; but of general and extensive import: not confined to any particular state, but founded on the great principle of reason, justice, and universal law. The learned *Roccus*, who has accurately examined the works of those writers that went before him, and who, after stating their various opinions, forms his own conclusions, has not been silent upon this occasion. He puts this question. "Assecurator, qui jam solvit æstimationem mercium deperditarum, si "postea dictæ merces appareant et recuperatæ sint, an possit "cogere dominum ad accipiendas illas, et ad reddendam sibi "æstimationem, quam dedit?" He answers, "Distingue; "aut

Roccus, Not. 50.

" aut merces, vel aliqua pars ipſarum appareant, et reſtitui " poſſint, ante ſolutionem æſtimationis, et tunc tenetur domi- " nus mercium illas recipere, et pro illa parte mercium appa- " rentium, liberabitur aſſecurator, nam qui tenetur ad certam " quantitatem reſpectu certæ ſpeciei, dando illam, liberatur, et " etiam, quia contractus aſſecurationis, eſt conditionalis, ſcilicet " ſi merces deperdantur: non autem dicuntur deperditæ, ſi " poſtea reperiantur. Verum ſi merces non appareant in illa " priſtina bonitate, aliter fit æſtimatio, non in totum, ſed prout " tunc valent. Aut vero poſt ſolutam æſtimationem ab aſſecu- " ratore compareant merces, et tunc eſt in electione mercium " aſſecurati vel recipere merces, vel retinere pretium."

* And although a ſubſequent paſſage in the ſame author may ſeem to contradict that juſt recited; yet when attended to they are both perfectly conſiſtent. He ſays, " ſufficit ſemel " extitiſſe conditionem ad beneficium aſſecurati de amiſſione " navis, etiam quod poſtea ſequeretur recuperatio; nam per " talem recuperationem non poterit præjudicari aſſecurato." *P. 145 Roccus, No. 66.

From this paſſage it may be inferred, that a total loſs having once happened, it muſt always continue ſo. But it muſt be underſtood, with reference to the context, and other parts of the work, from which it appears that in order to entitle the inſured to recover as for a total loſs, it muſt continue total, at the time when the offer of abandonment is made, at the time of the action brought, or at the time of the payment of the money.

In a *French* treatiſe, called *Le Guidon*, it is ſaid, that the inſured may abandon to the underwriter, and call upon him for a total loſs, if the damage exceed half the value of the thing; or if the voyage be loſt, or ſo interrupted, that the purſuit of it is not worth the freight. Chap. 7. 1. 1.

The ſame idea, with reſpect to the circumſtances which will juſtify an abandonment, ſeems to prevail in almoſt all the foreign ordinances. Ord Lew 14. Ord. of Bilb. Ord. of Rot.

But in no country have the principles of abandonment been more accurately defined than in *England*: and it muſt be remembered, that the deciſions, from which the following principles are ſelected, are of the greateſt authority; that they are not merely the opinions of private ſpeculative men, but the ſolemn and deliberate judgment of the grave and learned judges of the *Engliſh* courts; judgments formed after mature deliberation, and ſerious argument; eſtabliſhed upon the ſolid and permanent *baſis* of reaſon and good ſenſe. 2. Magens

From thoſe deciſions we may collect, that the right to abandon muſt ariſe upon the object of the inſured being ſo far defeated, that it is not worth his while to purſue it: ſuch a loſs as is equally inconvenient to him, as if it had been total. For inſtance, if the voyage be abſolutely loſt, or not worth purſuing; 2 Burr. 1269.

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if the ſalvage be very high, *ſuppoſe a half*; if further expence be * neceſſary; if the inſurer will not engage at all events to bear that expence, though it ſhould exceed the value, or fail of ſucceſs: under theſe, and many other like circumſtances, the inſured may diſentangle himſelf, and abandon, notwithſtanding there has been a recapture.

Guidon. ch. 7. ſ. 1.

* P. 146

2 Burr. 697. 1213.

It is evident, that there may be circumſtances, in which it would be contrary to every principle of juſtice, to ſuffer the inſured to abandon; for a ſhip might be taken, and eſcape immediately, which would be no hinderance at all to the voyage: or ſhe might be taken and inſtantly ranſomed, which would amount only to a partial loſs; in which caſes the inſured ſhall not to be allowed to demand a recompenſe for a total loſs.

Burr. 1214.

It is alſo material to obſerve, that the right to abandon muſt depend upon the nature of the caſe at the time of the action brought, or at the time of the offer to abandon: a determination, founded as I have ſaid before, on the nature of the contract between the parties; becauſe an inſurer ought never to pay leſs, upon a contract of indemnity, than the value of the loſs; and the inſured ought never to gain more.

Term Rep. for Eaſter, 26 Geo. 3, p. 191.

From what has been ſaid, it will appear ſufficiently evident, that the owner cannot abandon, unleſs at ſome period or other of the voyage there has been a total loſs: and therefore, if neither the thing inſured, nor the voyage be loſt, and the damage ſuſtained ſhall be found, upon computation, not to amount to a moiety of the value, the owner ſhall not be allowed to abandon.

Theſe principles are fully illuſtrated and confirmed by the judgments given in the following caſes.

Pringle v. Hardley, in Chancery, 1744. 3 Atk. 195.

The defendant had inſured the ſhip *Succeſs* from *London* to *Bermudas*, and ſo to *Carolina*; the ſhip was taken by a *Spaniſh* privateer, and afterwards retaken by an *Engliſh* privateer, and carried into *Boſton* in *New England*, where, no perſon appearing to give ſecurity, or to anſwer the moiety the recaptors were entitled to for ſalvage, ſhe was condemned, and ſold in the court of Admiralty there; the recaptors had their moiety and the overplus money remained in the hands of the officers of the court. An action upon the policy was brought

* P. 147

* at law by the defendant here, who obtained a verdict againſt the now plaintiff.

The plaintiff brought a bill, ſuggeſting the capture to be fraudulent, and done deſignedly by the captain; and now moved for an injunction to ſtay the proceedings at law.

It was contended for the plaintiff, that though the capture might not be fraudulent, yet the defendant ought not to recover more on the policy than a moiety of the loſs, as the act of the 13 *Geo.* 2. *c.* 4. *ſ.* 18. gives the thing ſaved to the owner, and he is entitled to receive it from the officers of the Admiralty:

and

and that the plaintiff ought to be obliged to pay no more than the loſs actually ſuſtained, which cannot be aſcertained till after the defendant ſhall have received the part, that might have come to him upon the ſalvage,

The defendant in his anſwer had ſworn, that he had offered, and was now willing to relinguiſh his intereſt to the plaintiffs in the benefit of the ſalvage, and would give them a letter of attorney for that purpoſe to receive it.

Lord Chancellor *Hardwicke*.—There is no ground for an injunction in this caſe, here there was an agreement to go to trial in one of theſe actions which had been brought, and to be bound by the event of that: at the time of the trial, they knew that the ſhip was retaken, and the manner of the capture.

The *quantum* of the damage and loſs ſuſtained is the only thing now to be diſputed; for it is impoſſible to carry on trade without inſuring, eſpecially in time of war. Therefore regard muſt be had to the inſured, as well as to the inſurer; and where there is no admiſſion in the anſwer of any kind of fraud, though various pretences of that ſort may be ſet up by the bill, they are not to be regarded. The queſtion then ariſes on the ſtatute of 13 *Geo.* 2. with regard to the ſalvage.

It had been ſaid, there ought to be only half the loſs recovered on the policy; and as to that, the act has made great alteration in the law of nations, with reſpect to recaptures.

* The carrying a ſhip *infra præſidia hoſtium*, or *ſi pernoctaverit* with the enemy, makes it the prize of the perſon retaking it, as if it had been originally the ſhip of the enemy: but by the act the recaption is the reveſting of the property of the owner. If there is a ſalvage, that muſt be deducted out of the money recovered by the policy; but if none has come to the hands of the plaintiff in the action, the jury cannot take notice of it. The ſhip was condemned and ſold, becauſe the money was not paid, or ſecured to be paid by the owners. * P. 148

It is uncertain, whether the defendant will receive anything or not; and if any thing be recovered, he muſt have an allowance for his expences in recovering.

Therefore I take it, when he is willing to relinquiſh his intereſt in the ſalvage, he ought to recover the whole money inſured. It would be miſchievous, if it were otherwiſe, for then upon a recapture a man would be in a worſe ſituation, than if the ſhip were totally loſt. Injunction was denied.

But the firſt caſe to be found in our books, in which the doctrine of abandonment was fully gone into, in which its principles were ſettled, and were applied to the particular circumſtances then before the court, was the caſe of *Goſs* and Another againſt *Withers*.

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(a) It was a ſpecial caſe from the ſittings in *London*, upon two actions, on two diſtinct policies of inſurance; one upon a ſhip, and the other upon the loading.

(a) Gosand Another v. Withers. 2 Burr. 683.

The former was an inſurance on the *David* and *Rebecca*, at and from *Newfoundland* to her port of diſcharge in *Portugal* or *Spain*, without the *Streights*, or *England*, to commence from the time of her beginning to load at *Newfoundland*, for either of the above named places; and to continue till ſhe ſhould be arrived at her ſaid port of diſcharge, and there moored 24 hours at anchor in ſafety. The ſhip was, by agreement, to be valued at the ſum ſubſcribed, without further account. The inſurance was to be at ten guineas *per cent.*: and in caſe of loſs to abate two *per cent.*: and in caſe of average loſs not exceeding 5*l. per cent.* to allow nothing towards ſuch loſs. And if the veſſel was * P. 149 * diſcharged without the *Streights*, excepting the *Bay of Biſcay* two guineas *per cent.* were to be returned: and if ſhe ſailed with convoy and arrived, two guineas more *per cent.* were to be returned. The plaintiffs declared upon a total loſs, by capture by the *French*.

The policy, declared upon in the other action, was an inſurance upon any kinds of lawful goods and merchandizes, loaden or to be loaden on board the aforeſaid ſhip; and this policy for 7*l.* 7*s* inſured 70*l.* The declaration alledged, that divers quantities of fiſh and other lawful merchandizes, to the value of the money inſured, were put on board, to be carried from *Newfoundland* to her port of deſtination, and ſo continued (except ſuch as were thrown overboard as is after mentioned) till the loſs of the ſhip and goods. The declaration then avers, that a part of the ſaid goods were neceſſarily thrown overboard in a ſtorm, to preſerve the ſhip and the reſt of the cargo: after which jetſon the ſhip, and the remainder of the goods, were taken by the *French*.

The caſe ſtates, that the ſhip departed from her proper port, and was taken by the *French* on the 23d of *December*, 1756. and that the maſter, mates, and all the ſailors, except an apprentice and landman, were taken out and carried to *France*. That the ſhip remained in the hands of the enemy *eight days*, and was then retaken by a *Britiſh* privateer, and brought in on the 18th of *January* to *Milford-Haven*, and that immediate notice was given by the inſured to the inſurer, with an offer to abandon the ſhip to their care. It was alſo proved at the trial, that before the taking by the enemy, a violent ſtorm aroſe at ſea, which firſt ſeparated the ſhip from her convoy, and afterwards diſabled her ſo far as to render her incapable of proceeding on her deſtined voyage, without going into port to refit. It was alſo proved, that part of the cargo was thrown over-board in the ſtorm: and the reſt of it was ſpoiled while the ſhip lay at *Milford-Haven*, after the offer to abandon, and before

before ſhe could be refitted: and the inſured proved their intereſt in the ſhip and cargo, to the value inſured.

Several queſtions ariſing upon the trial of the firſt of theſe cauſes, it was agreed, that the jury ſhould bring in their verdict, * in both cauſes, for the plaintiffs, as for a total loſs; ſubject, however, to the opinion of the court on the following queſtions, *viz.* * P. 150

1ſt. Whether this capture of the ſhip by the enemy, was or was not ſuch a loſs, as that the inſurers became liable thereby:

2dly. Whether under the ſeveral circumſtances of this caſe, the inſured had or had not a right to abandon the ſhip to the inſurers, after ſhe was carried into *Milford Haven*.

After two arguments, the court decided unanimouſly in favour of the plaintiffs; and in the opinion then delivered by Lord *Mansfield*, all the law upon this ſubject was fully diſcuſſed. It will not be neceſſary, however, to ſtate in this place what fell from his lordſhip upon the firſt of theſe queſtions thus ſubmitted to the opinion of the court; becauſe that was very copiouſly treated of in a former chapter, in which it was ſhewn, that whether property was or was not transferred to the enemy by a capture, and abſolutely loſt to the original owner, it could no way affect the contract entered into between an inſurer and inſured. It will be ſufficient then to follow his Lordſhip in the ſecond part of his argument. Vide ante c. 4. p. 66. 69.

Lord *Mansfield*.—The ſingle queſtion, therefore, upon which this caſe turns, is, whether the inſured had, under all the circumſtances, an election to abandon, on the 18th of *January*, 1757? The loſs and diſability were in their nature total at the time they happened. During eight days, the plaintiff was certainly entitled to be paid by the inſurer, as for a total loſs; and in caſe of a recapture, the inſurer would have ſtood in his place. The ſubſequent recapture is, at beſt, a ſaving only of a ſmall part: half the value muſt be paid for ſalvage. The diſability to purſue the voyage ſtill continued. The maſter and mariners were priſoners. The charter party was diſſolved. The freight (except in proportion to the goods ſaved) was loſt. The ſhip was neceſſarily brought into an *Engliſh* port. What could be ſaved, might not be worth the expence neceſſarily attending it; which is proved by the plaintiff's offer to abandon. The ſubſequent title to reſtitution, ariſing from the recapture, at a great expence, the ſhip too * being diſabled from purſuing her voyage, cannot take away a right veſted in the inſured at the time of the capture. But becauſe he cannot recover more than he has ſuffered, he muſt abandon what may be ſaved. I cannot find a ſingle book, ancient or modern, which does not ſay, that in caſe of a ſhip being taken, the inſured may demand as for a total loſs, and * P. 151 Vide theſtat. 13. 1. 10. c. 4.

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abandon. What proves the propoſition moſt ſtrongly is, that by the general law, he may abandon in the caſe merely of an arreſt, or an embargo, by a prince not an enemy. Poſitive regulations in different countries have fixed a preciſe time before the inſured ſhould be at liberty to abandon in that caſe. The fixing a preciſe time proves the general principle. Every argument holds ſtronger in the caſe of the other policy with regard to the goods. The cargo was in its nature periſhable, deſtined from *Newfoundland* to *Spain* or *Portugal:* and the voyage was as abſolutely defeated, as if the ſhip had been wrecked, and a third or fourth of the goods ſaved.

Vide ante, c. 4. p. 78.

No capture by the enemy can be ſo total a loſs, as to leave no poſſibility of a recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by the late act of parliament, if an *Engliſh* ſhip retake at any time, before condemnation or after, the owner is entitled to reſtitution upon ſtated ſalvage. This chance does not ſuſpend the demand, for a total loſs, upon the inſurer: but juſtice is done, by putting him in the place of the inſured, in caſe of a recapture. In queſtions upon policies, the nature of the contract, as an indemnity, and nothing elſe, is always liberally conſidered. There might be circumſtances, under which a capture would be but a ſmall temporary hindrance to the voyage; perhaps none at all: as if a ſhip were taken, and, in a day or two, eſcaped entire, and purſued her voyage. There are circumſtances, under which it would be deemed an average loſs; if a ſhip taken be immediately ranſomed, and purſue her voyage, there the money paid is an average loſs. And in all caſes, the inſured may chuſe not to abandon. In the ſecond part of the "Uſages and Cuſtoms of the Sea," (a *French* book tranſlated into *Engliſh*) a treatiſe is inſerted called Le Guidon, in which after mentioning the right to abandon upon a capture, he adds, "or any other ſuch diſturbance as defeats the voyage; or * makes it not worth while, or worth the freight to purſue it." I know that in late times the privilege of abandoning has been reſtrained, for fear of letting in frauds: and the merchant cannot elect to turn that, which, at the time it happened, was in its nature but a partial, into a total loſs, by abandoning. But there is no danger of fraud in the preſent caſe. The loſs was total at the time it happened: it continued total, as to the deſtruction of the voyage. A recovery of any thing could only be had, by paying more than half the value, including the coſts. What could be ſaved of the goods, might not be worth the freight for ſo much of the voyage as they had gone, when they were taken. The cargo, from its nature, muſt have been ſold, where it was brought in. The loſs, as to the ſhip, could not be eſtimated; nor the ſalvage of half be fixed, by a better meaſure than a ſale. In ſuch a caſe, there is no colour

Vide ante p. 145.

* P. 152

colour to ſay, that the inſured might not diſentangle himſelf from unprofitable trouble and further expence, and leave the inſurer, to ſave what he could. It might as reaſonably be argued, that if a ſhip ſunk were weighed up again at great expence, the crew having periſhed, the inſured could not abandon, nor the inſurer be liable, becauſe the body of the ſhip was ſaved. We are therefore of opinion, that the loſs was total by the capture, and the right which the owner had, after the voyage was defeated, to obtain reſtitution of the ſhip and cargo, paying great ſalvage to the recaptor, might be abandoned to the inſurers, after ſhe was brought into *Milford-Haven*.

The principles laid down in this caſe have been ſtrictly adhered to in all ſimilar caſes; and particularly in a very modern one, which it will be proper to mention in this place, before we come to the great cauſe of *Hamilton* againſt *Mendes*, in which ſome other principles relative to this ſubject were eſtabliſhed.

It was an action on a policy of inſurance, on the ſhip the *Hope* and her freight, from *Montſerrat* to *London*. The plaintiff went for a total loſs: the defendant inſiſted, that he was only entitled to recover for an average loſs. The jury found a verdict for a total loſs; and upon a motion for a new trial, * the facts of the caſe appeared to be as follows: the ſhip when proceeding on her voyage, was captured on the 23d of *May*, by two *American* privateers, who took the captain and all the crew, and part of the cargo, which conſiſted of ſugars, out of her. The rigging was alſo taken away. She was afterwards retaken, and carried into *New York*, where the captain arrived on the 23d of *June*, and, taking poſſeſſion of her, found that part of what had been left of the cargo was waſhed overboard, that fifty-ſeven hogſheads of what remained were damaged, and that the ſhip was leaky, and in ſuch a ſtate, that ſhe could not be repaired without unloading her entirely. The owners had no ſtorehouſes at *New York*, in which the ſugars could have been put, while the ſhip was repairing, nor any agent, there to adviſe or direct the captain. No ſailors were to be had. The only method he had of paying the ſalvage, *which amounted to the value of forty hogſheads of ſugar*, was by ſale of part of the cargo, or the ſhip. The captain did not know of the inſurance. If he had repaired the ſhip, his expences would have exceeded the freight more than 100*l*.. There was an embargo on all veſſels at *New York* till the 27th of *December*; and by the deſtination of his ſhip, ſhe was to have arrived at *London* in *July*. Under theſe circumſtances, he conſulted with his friends at *New York*, and reſolved upon their opinion and his own, to ſell the ſhip and cargo, as the moſt prudent ſtep for the intereſt of his employers. The cargo was accordingly ſold

Milles v. Fletcher. Douglas 219.

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ſold and paid for. The ſhip was alſo contracted for, but the perſon who had agreed to buy her, ran away, and the captain left her in a creek near *New York*, and returned to *England*, where he arived in the *February* following, and gave the plaintiff notice of what had been done, which was the firſt information he received of it, and the plaintiff immediately claimed as for a total loſs from the underwriters, and offered to abandon. Lord *Mansfield* told the jury, that if they were ſatisfied the captain had done what was beſt for the benefit of all concerned, they muſt find as for a total loſs, which they accordingly did.

Upon the motion for a new trial, the unanimous opinion of the court was delivered by

* P. 154 * Lord *Mansfield*,—The great object in every branch of the law, but eſpecially in mercantile law, is certainty, and that the grounds of deciſion ſhould be preciſely known. I took great pains in delivering the opinion of the court in the caſes of *Goſs* v. *Withers*, and *Hamilton* v. *Mendes*. I read both thoſe caſes over laſt night, and I think that from them, the whole law between inſurers and inſured, as to the conſequences of capture and recapture, may be collected. Wherever a queſtion of law ariſes at *niſi prius*, I propoſe a caſe, or grant one, when aſked for by the counſel, and I avoid as much as poſſible blending fact and law together, having ſeen the inconvenience of it in *Pole* v. *Fitzgerald*. But on the trial of this cauſe it did not appear to me, that there was any queſtion of law, and no caſe was aſked for. It was impoſſible to aſk for one, till the facts were aſcertained; and when they were, it would have been impoſſible to ſtate them in any way, which could have left a doubt on the law. It was not contended, that a capture *neceſſarily* amounts to a total loſs between inſurer and inſured; nor, on the other hand, that on a capture and recapture, there may not be a total loſs, though there remain ſome material tangible part of the ſhip and cargo. Neither was it contended, that the captain has an arbitrary power, by his act, to make the loſs, either partial or total, as he pleaſes. A great deal has been ſaid about what the Admiralty could, or would have done, in ſuch a caſe, in order to pay the ſalvage. As to that, if no owner appeared, they would condemn the whole; but if they ſaw from the ſhip's papers, that there was one, they would not. If there were different claimants of the ſhip and cargo, they would leave it to them to ſay, what part ſhould be ſold and if they differed in opinion, would order the ſale of ſuch part as would be attended with the ſmalleſt loſs. But all *that* is foreign to the preſent queſtion, which is ſingly this, whether the conſequences of the capture were ſuch as, notwithſtanding the recapture, occaſioned a total obſtruction of the voyage, or only a partial one, as in the caſe of *Hamilton* v. *Men-*

Vide poſt.

v. *Mendes*. In that caſe, and in *Goſs* v. *Withers*, great ſtreſs was laid on the ſituation of the ſhip and cargo, at the time when the inſured had notice, at the time of the offer to abandon, and at the time when the action was brought. No caſes ſay, that the bare exiſtence of the hulk of the ſhip prevents the loſs being total. The rule is laid down, "that if the voyage * P. 155
"be loſt, or not worth purſuing, if the ſalvage be high, if far-
"ther expence be neceſſary, if the inſurer will not at all
"events undertake to pay that expence, &c. the inſured may
"abandon, notwithſtanding a recapture." Here, at the time of the capture there were no hopes of a recovery; no friend's ſhip in ſight; no means of reſiſtance; all the crew were taken out, and part of the cargo; and the rigging alſo taken away. Afterwards the ſhip was retaken, and carried into *New York*. When ſhe was brought there, it ſtill continued a total loſs. Neither the inſurers, nor the inſured, had any agent in the place. The court of Admiralty muſt have proceeded *ſecundum æquum et bonum*, and might have ſold her for the benefit of thoſe concerned. When the inſured firſt had notice, and offered to abandon, (which was when the captain came to *England*) and when the action was brought, it was ſtill a total loſs. The voyage was abandoned, the cargo ſold, and the ſhip left to be ſold. The only anſwer the defendant makes, or can make to this is, that the loſs was total indeed; but that the captain made it ſo, by his improper conduct; for that on his taking poſſeſſion of the ſhip, the loſs became partial, and that he ought to have purſued the voyage. But is this defence true in fact? The captain, when he came to *New York*, had no expreſs order; but he had an implied authority, from both ſides, to do what was fit and right to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ſhip and cargo, the underwriter muſt anſwer for the conſequences of, becauſe this is within his contract of indemnity. Suppoſe there had been no inſurance, what ought the captain to have done? 1ſt. As to the cargo, according to the courſe of the voyage, the ſhip ſhould have arrived at *London* in *July*. On the capture, part had been taken out, ſome was waſhed overboard, 57 hogſheads were damaged, and the whole, from the leaking of the veſſel, was in a periſhable ſtate. There were no ſtorehouſes; nor could the ſhip proceed in the ſtate ſhe was in. The crew were gone, and an embargo was laid on till *December*. What, ſhall a cargo, which was intended to arrive at *London* in *July*, be kept in a periſhable ſtate at *New York*, in a leaky veſſel, till *December*? 2dly, As to the ſhip. it was certainly better to ſell her, than to * bring her to *London*. There was no crew belonging to her; and ſhe had no cargo. Even if all the cargo had been left, * P. 156
the expences of repairs would have exceeded the freight. If

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ſhe had been brought home, the expence of bringing her might have been more than what ſhe would have ſold for in *London*. It has been ſaid, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy; for that circumſtance goes to determine it to be the intereſt of the inſured to abandon the voyage. The point is, what did the owner ſuffer by the capture; and it appears that he ſuffered ſo much, that it was not worth while to purſue the voyage. The whole voyage was loſt. As the captain did not know of the inſurance, he had no temptation to give the turn of the ſcale to one ſide or the other. I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found "*that it was*" in words, where would have been the queſtion of law?

The court therefore diſcharged the rule for a new trial.

It was neceſſary to be very particular in ſtating this caſe from the work of ſuch an accurate reporter as Mr. *Douglas*, for two reaſons: 1ſt, Becauſe it is a determination, exactly conformable to that of *Goſs* v. *Withers*, recognizing and confirming the principles there laid down; and 2dly, To relieve the court from the obſervations made, on account of the above deciſion.

Weſkett on Inſurance, p. 4.

A caſe has appeared in print, under the name of *Milles* v. *Hayley*, upon the ſame policy, the ſame ſhip, and ſame voyage: but the author of the work, in which it appears, could not poſſibly have been preſent at the trial; and the facts muſt have been miſtated to him: or if preſent, he has not taken down the evidence with ſufficient accuracy. For he has not ſtated, that on the capture, part of the cargo, and alſo the rigging were taken away: that part of what had been left of the cargo was waſhed overboard: that 57 hogſheads of the ſugar that remained, were damaged; that the ſhip was leaky, and in ſuch a ſtate, that ſhe could not be repaired without unloading her entirely: that the ſalvage amounted to the value of 40 hogſheads of ſugar: that the repairs would have exceeded the freight by more than 100*l.*: and that the embargo was to continue till the 27th of *December*: whereas the ſhip ought to

* P. 157 * have arrived at *London* in the *July* preceding: all which circumſtances are to be found in Mr. *Douglas's* report: all of them are material to the deciſion of the cauſe, and upon all of them much ſtreſs is laid by Lord *Mansfield*, in delivering the judgment of the court. It was thought proper to note theſe differences; as nothing is ſo neceſſary in all caſes, more eſpecially in thoſe of inſurance, as the accurate and preciſe ſtatement of circumſtances.

But although the doctrine advanced in *Goſs* againſt *Withers*, was ſo very general and comprehenſive; yet it certainly is not to be conſidered, as precluding the poſſibility of an exception to the generality of the principle there eſtabliſhed.

Indeed,

Indeed, from the whole tenour of the Chief Juſtice's very learned argument upon that occaſion, it is apparent, that he had at that very time an exception in his view: and from ſome of the words he then uſed, it would almoſt induce one to ſuppoſe, that his lordſhip had foreſeen the very caſe, which actually came to be decided within a few years afterwards.

Hamilton v. Mendes. 2 Burr. 1198 and 1 Black. 276.

It was a ſpecial caſe reſerved at *Guildhall*, at the ſittings there before Lord *Mansfield*, after *Michaelmas* term 1760, in an action brought againſt the defendant, as one of the inſurers, upon a policy of inſurance from *Virginia* or *Maryland* to *London*, of a ſhip called the *Selby*, and of goods and merchandize therein, until ſhe ſhall have moored at anchor 24 hours, in good ſafety. The caſe ſtated for the opinion of the Court was as follows:

That the ſhip *Selby*, mentioned in the policy, being valued at 1200*l*.; and the plaintiff having intereſt therein, cauſed the policy in queſtion to be made; and the ſame was accordingly made, in the name of *John Mackintoſh* on behalf and for the uſe and benefit of the plaintiff, and was ſubſcribed by the defendant, as ſtated, for 100*l*. That the ſhip was in good ſafety at *Virginia*, where ſhe took on board 192 hogſheads of tobacco, to be delivered at *London*. That on the 28th day of *March*, ſhe departed, and ſet ſail from *Virginia* for *London*; and on the 6th day of *May* following, as ſhe was ſailing and * proceeding in her ſaid voyage, was taken by a *French* privateer called the *Aurora* of *Bayonne*. That at the time of the capture, the *Selby* had nine men on board; and the captain of the ſaid privateer took out ſix, beſides the captain, leaving only the mate and one man on board. That the *French* put a prize-maſter, and ſeveral men on board the ſhip *Selby*, to carry her to *France*. That as the *French* were carrying her towards *France*, on the 23d day of the ſaid *May*, ſhe was retaken off *Bayonne*, by an *Engliſh* man of war; and accordingly ſent into *Plymouth*, where ſhe arrived the 6th day of *June* following. That the plaintiff, living at *Hull*, as ſoon as he was informed what had befallen his ſhip, the *Selby*, wrote a letter, on the 23d of *June*, to his agent *John Mackintoſh*, living in *London*, to acquaint the defendant, "that the plaintiff did from thence abandon to him "his intereſt in the ſaid ſhip, as to the ſaid 100*l*. by the defen- "dant inſured." That the ſaid *I. M.* on the 26th of *June*, acquainted the defendant with the offer to abandon the ſhip; to which the defendant anſwered, "that he did not think himſelf "bound to take to the ſhip; but was ready to pay the ſalvage, "and all other loſſes and charges that the plaintiff ſuſtained by "the capture." That upon the 19th day of *Auguſt*, the ſhip *Selby* was brought into the port of *London*, by the order of the owners of the cargo, and the recaptors: that the ſhip *Selby* ſuſtained no damage from the capture. That the whole cargo

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of the ſaid ſhip was delivered to the freighters, at the port of *London*, who paid the freight to *Benjamin Vaughan*, without prejudice. The queſtion, therefore, ſubmitted to the opinion of the court is, whether the plaintiff, on the ſaid 26th day of *June*, had a right to abandon, and has a right to recover, as for a total loſs.

After two arguments at the bar upon this queſtion, and after the court had taken time to deliberate upon it, their unanimous reſolution was delivered by the Chief Juſtice.

Lord *Mansfield*—The plaintiff has averred in his declaration, as the baſis of his demand for a total loſs, "that by the "capture, the ſhip became wholly loſt to him." The general queſtion is, whether the plaintiff, who, at the time of his action brought, at the time of his offer to abandon, and at the time of his being firſt apprized of any accident having happened,
* P. 159. * had only, in truth, ſuſtained a partial loſs, ought to recover for a total one. In ſupport of the affirmative, the counſel for the plaintiff inſiſted on the four following points: 1ſt, That by this capture, the property was changed; and therefore, the loſs total for ever. 2dly, If the property were not changed, yet the capture was a total loſs. 3dly, That when the ſhip was brought into *Plymouth*, particularly on the 26th day of *June*, the recovery was not ſuch as, in truth, changed the totality of the loſs into an average. 4thly, Suppoſing it did, yet, the loſs having once been total, a right veſted in the inſured to recover the whole upon abandoning; of which right he could never be diveſted by any ſubſequent event.

As to the firſt point. If the change of property were at all material between the inſurer and inſured, it would not be applicable to this caſe; becauſe by the marine law of *England*, there is no change of property, in caſe of a capture, before
29 Geo. 2. c. 34. ſ. 24. condemnation; and now by the act of parliament, the *jus poſtliminii* continues for ever. I know many writers argue, between the inſurer and the inſured, from the diſtinction, whether the property was or was not changed by the capture, ſo as to transfer a complete right from the enemy to a recaptor, or neutral vendee, againſt the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and recaptor, or a vendee, ought never to be the rule of deciſion, as between the inſurer and inſured upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree with the counſel for the plaintiff, upon this ſecond point, that by this capture, while it continued, the ſhip was totally loſt, though it be admitted, that the property, in the caſe of a recapture, never was changed, but returned to the former owner.

The third point depends, as every queſtion of this kind muſt, upon the particular circumſtances. It does not neceſſarily follow that

that becauſe there is a recapture, therefore the loſs ceaſes to be total. If the voyage be ſo defeated, as not to be worth the further purſuit; if the ſalvage be high, and the other expences great; or if the underwriter refuſe to bear theſe expences; the inſured may abandon. But in the preſent caſe, the voyage was ſo far from being loſt, that it had only met with a ſhort temporary obſtruction; the ſhip and cargo were both entirely ſafe; * P. 160 the expence incurred did not amount to near half the value; and upon the 26th of *June*, when the ſhip was at *Plymouth*, and the offer was made to abandon, the inſurer undertook to pay all charges and expences, to which the plaintiff might be put by the capture. The only argument to ſhew that the loſs had not then ceaſed to be total, was built upon a miſtaken ſuppoſition, that the recaptor had a right to demand a ſale, and to put a ſtop to any further proſecution of the voyage. But that is not ſo. The property returned to the plaintiff, pledged to the recaptors for one eighth of the value, as ſalvage for retaking and bringing the ſhip into an *Engliſh* port. Upon paying this, the owner was entitled to reſtitution. The recaptor had no right to ſell the ſhip. If they differed about the value, the Court of Admiralty would have ordered a commiſſion of appraiſement. In this caſe, it was the intereſt of the owner of the ſhip, the owners of the cargo, and the recaptors, that ſhe ſhould forthwith proceed upon her voyage from *Plymouth* to *London*. But had the recaptor oppoſed it, or affected delay, the court of Admiralty would have made an order for bringing her immediately to *London*, her port of delivery, upon reaſonable terms. Therefore it is moſt clear, that upon the 26th day of *June*, the ſhip had ſuſtained no other loſs, by reaſon of the capture, than a ſhort temporary obſtruction, and a charge which the defendant had offered to pay and ſatisfy. This brings the whole to the fourth and laſt point.

The plaintiff's demand is for an indemnity. This action then muſt be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loſs, when the final event has decided, that the damnification, in truth, is an average, or perhaps no loſs at all. Whatever undoes the damnification, in whole or in part, muſt operate upon the indemnity, in the ſame degree. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event, no damage has been ſuſtained. This reaſoning is ſo much founded in ſenſe, and the nature of the thing, that the common law of *England* adopts it, though inclined to ſtrictneſs. The tenant is obliged to indemnify his lord from waſte; but if the tenant do, or ſuffer waſte to be done in houſes, yet if he repair before any action * brought, there lies no action of waſte againſt him He cannot * P. 161 however plead "*non fecit vaſtum*;" but the ſpecial matter. The

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ſpecial matter ſhews, that the injury being repaired before the action brought, the plaintiff had no cauſe of action; and whatever takes away the cauſe, takes away the action. Suppoſe a ſurety ſued to judgment: and afterwards, before an action is brought, the principal pays the debt and coſts, and procures ſatisfaction to be acknowledged upon record: the ſurety can have no action for an indemnity, becauſe he is indemnified before any action is brought. If the demand or cauſe of action does not ſubſiſt, at the time the action is brought, the having exiſted at any former time can be of no avail. But in the preſent caſe, the notion of a veſted right in the plaintiff to ſue as for a total loſs, before the recapture, is fictitious only, and not founded in truth. For the inſured is not obliged to abandon, in any caſe; he has an election. No right can veſt as for a total loſs, till he has made that election: he cannot elect, before advice is received of the loſs; and if that advice ſhew the peril to be over, and the thing in ſafety, he cannot elect at all, becauſe he has no right to abandon when the thing is ſafe. Writers upon maritime law are apt to embarraſs general principles, with the poſitive regulations of their own country: but they all ſeem to agree, that if the thing be recovered before the money is paid, the inſured can only be entitled according to the final event. His lordſhip here cited the paſſage from *Roccus*, which we have already ſeen at the beginning of this chapter, and then proceeded thus.

Co. Lit. 53. a.

Roccus Not. 50.

Vide ante, c. 4. p. 75.

In the caſe of *Spencer* v. *Franco*, though upon a wager policy, the loſs was held not to be total, after the return of the ſhip *Prince Frederick* in ſafety; though ſhe had been ſeized and long kept by the king of *Spain*, in a time of actual war. In the caſe of *Pole* v. *Fitzgerald*, though upon a wager policy, the majority of the judges, and the houſe of lords held there was no total loſs, the ſhip having been reſtored before the expiration of the four months, the time for which ſhe was inſured.

Vid Poſt 170

The preſent attempt is the firſt that ever was made, to charge the inſurer as for a total loſs, upon an intereſt policy, after the thing was recovered: and it is ſaid, the judgment in the caſe of *Goſs* v. *Withers* gave riſe to it. It is admitted, that that caſe * was no way ſimilar. Before that action was brought, the whole ſhip and cargo were literally loſt; at the time of the offer to abandon, a fourth of the cargo had been thrown overboard; the voyage was entirely loſt; the remainder of the cargo was fiſh periſhing, and of no value at *Milford Haven*, where the ſhip was brought in; the ſhip ſo ſhattered, as to want great and expenſive repairs; the ſalvage was one half, and the inſurer did not engage to be at any expence; it did not appear that it was worth while to try to ſave any thing: and the recaptor, though entitled to one half, as well as the owner of the ſhip and cargo, left the whole to periſh, rather than be at any further trouble or expence. But it is ſaid, though the caſe was entirely different,

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rent, ſome part of the reaſoning warranted the propoſition now inferred by the plaintiff from it. The great principle relied upon was, "that as between the inſurer and inſured, the contract being an indemnity, the truth of the fact ought to be regarded; and therefore there might be a total loſs by a capture, which could not operate as a change of property; and a recapture ſhould not relate by fiction (like the *Roman jus poſtliminii*) as if the capture had never happened, unleſs the loſs was in truth recovered." This reaſoning proved *e converſo*, that if the thing in truth were ſafe, no artificial reaſoning ſhall be allowed to ſet up a total loſs. The words quoted at the bar were certainly uſed, "that there is no book, ancient or modern, which does not ſay, that in caſe of the ſhip being taken, the inſured may demand for a total loſs, and abandon." But the propoſition was applied to the ſubject matter, and is certainly true, provided the capture, or the total loſs occaſioned thereby, continue to the time of abandoning, and bringing the action. The caſe then before the court did not make it neceſſary to ſpecify all the reſtrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was ſaid to prevent any inference being drawn, beyond the caſe then determined.

His lordſhip, having read a great part of his former argument in that caſe, went on in this way. Vide ante. p. 150.

From this mode of reaſoning, it did by no means follow, that if the ſhip and cargo had, by the recapture, been brought ſafe to the port of delivery, without having ſuſtained any damage * at all, that the inſured might abandon. But without dwelling longer upon principles or authorities, the conſequences of the preſent queſtion are deciſive. It is impoſſible that any man ſhould deſire to abandon in a caſe circumſtanced like the preſent, but for one of two reaſons, namely, either becauſe he has over-valued, or becauſe the market has fallen below the original price. The only reaſons, that can make it the intereſt of the party to deſire, are concluſive againſt allowing it. It is unjuſt to turn the fall of the market upon the inſurer, who has no concern in it, and could never gain by the riſe. And an over valuation is contrary to the general policy of the marine law; contrary to the ſpirit of the act of 19 *Geo.* 2 a temptation to fraud, and a great abuſe: therefore no man ſhould be allowed to avail himſelf of having over valued. If the valuation be true, the plaintiff is indemnified, by being paid the charge he was put to by the capture. If he has overvalued, he will be a gainer, if he be permitted to abandon: and he can only deſire it, becauſe he has over-valued. This was avowed upon the firſt argument: and that very reaſon is concluſive againſt its being allowed. The inſurer, by the marine law, ought never to pay leſs, upon a contract of indemnity, than the value of the loſs: and the in-

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ſured ought never to gain more. Therefore, if there were occaſion to reſort to that argument, the conſequence of the determination would alone be ſufficient upon the preſent occaſion. But upon principles, this action could not be maintained as for a total loſs, if the queſtion were to be judged by the ſtricteſt rules of common law: much leſs can it be ſupported for a total loſs, as the queſtion ought to be decided, by the large principles of the marine law, according to the ſubſtantial intent of the contract, and the real truth of the caſe. If the queſtion is to depend upon the fact, every man can judge of the nature of the loſs, before the money is paid. But if it is to depend upon ſpeculative refinements, from the law of nations, or the *Roman jus poſtliminii*, concerning the change or reveſting of property, no wonder that merchants are in the dark, when doctors have differed upon the ſubject, from the beginning, and are not yet agreed. To obviate too large an inference being drawn from this determination, I deſire it may be underſtood, that the point here determined is, "that the plaintiff, upon a policy, "can only recover an indemnity, according to the nature of his "caſe at the time of the action brought, or (at moſt) at the time * "of his offer to abandon." We give no opinion how it would be, in caſe the ſhip or goods were reſtored in ſafety, between the offer to abandon, and the action brought; or between the commencement of the action, and the verdict. And particularly I deſire, that no inference may be drawn, "that in caſe "the ſhip or goods ſhould be reſtored after the money paid "as for a total loſs, the inſurer could compel the inſured to "refund the money, and to take the ſhip or goods;" that caſe is totally different from the preſent, and depends, throughout, upon different reaſons and principles. Here the event had fixed the loſs to be an average only, before the action brought; before the offer to abandon; and before the plaintiff had notice of any accident; conſequently before he could make an election. We are therefore of opinion, that he cannot recover for a total, but for a partial loſs only; the quantity of which has been eſtimated by the jury at ten pounds *per cent.*

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But although the court did not chuſe unneceſſarily to decide, whether after payment as for a total loſs, the underwriter could oblige the inſured to refund, if it ſhould afterwards prove to be but partial: yet in the year 1766 this very queſtion came before them. It aroſe in the caſe of *Da Coſta* v. *Firth*, which was cited at large in a preceding chapter; and the court held, that as there was a ſolemn abandonment, and the money was paid, and as there was alſo an agreement that the inſurers ſhould be content with ſuch ſalvage as the ſum inſured bore to the whole intereſt, the inſured ſhould not be obliged to refund, but the inſurer ſhould ſtand in his place for the ſalvage.

Da Coſta v. Firth 4 Burr. 1966. Vide ante c. 6. p. 118.

It

It has been already ſaid, and from the preceding caſes it ſeems to be a neceſſary inference, that in order to entitle the owner to abandon, there muſt, at ſome period or other of the voyage, have been a total loſs; for he cannot be allowed to turn a partial into a total loſs. There was, however, a very modern caſe, in which this was the ſingle point to be determined.

Cazalet and others v. Barbe. 1 TermRep p. 187.

It was an action on a policy of inſurance upon the ſhip *Friendſhip*, from *Wyburgh* to *Lynn*, ſubſcribed by the defendant for 100*l.* at two guineas *per cent.* The defendant pleaded a tender, and paid 48*l.* into court. The cauſe was tried at * *Guildhall*, before Mr. Juſtice *Buller*, when a caſe was reſerved for the opinion of the court, ſtating, that the *damages ſuſtained by the ſhip in the voyage inſured, did not exceed* 48*l. per cent.* which ſum the defendant had paid into court, upon pleading in the action. That when the ſhip arrived at the port of *Lynn*, ſhe was not worth repairing. The queſtion for the opinion of the court was, whether the plaintiffs had a right to abandon.

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This caſe came on to be argued when Lord *Mansfield* was abſent.

Mr. Juſtice *Willes*.—The queſtion is, whether, under theſe circumſtances, the plaintiffs had a right to abandon; or, in other words, whether they can turn a partial into a total loſs. The finding of the jury in this caſe determines the queſtion, becauſe it is expreſsly found that the damage did not exceed 48*l. per cent.* The caſe then ſtates, that the ſhip was not worth repairing, but no mention is made of what was her real worth; ſo that the remaining materials of the ſhip, if ſold, may make up the difference between 48*l.* and 100*l. per cent.* There has been no loſs either of the ſhip or of the voyage; but, being an old ſhip, ſhe ſuffered ſo much, that ſhe was not worth repairing. I cannot now determine that there was a total loſs, when the jury have already ſaid, that there was only a loſs of 48*l. per cent.* As to the caſe cited of *Bond* v. *Hunter*, this queſtion never occurred in it. The action was brought upon the homeward bound policy; and it was ſufficient to ſay, that that policy never attached, for the ſhip had received her death's wound in her outward bound voyage. In the caſe of *Milles* v. *Fletcher*, a total end was put to the voyage. In the other caſes the queſtions aroſe upon loſſes which had happened during the ſeveral voyages; here the voyage has been performed, and the ſhip is arrived; and after the jury have found that the damage ſuſtained did not amount to more than 48*l. per cent.* the court are precluded from ſaying it is a total loſs.

Vide ſupra p. 162.

Mr. Juſtice *Aſhhurſt*.—The facts found in this caſe preclude any queſtion, whether this can be conſtrued to be a total loſs. If the inſurers ſhould be held liable here, it would be making them

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* P. 166

* insure the goodneſs of the ſhip; and if the owners can recover as for a total loſs in this caſe, they might equally have recovered on account of the bad condition of the veſſel, though ſhe had not received much damage at ſea. It is not ſtated that the ſhip received her death's wound in the courſe of her voyage. When ſhe came into port it was found ſhe was not worth repairing; but *non conſtat* if ſhe had not received any damage during the voyage, ſhe would have been worth repairing. And though the veſſel was not in a ſound ſtate, yet ſhe had arrived in ſafety twenty four hours; and the jury having exactly defined what degree of damage ſhe had ſuſtained, we cannot ſay that the plaintiff ought to recover any more.

Mr. Juſtice *Buller*.—Nothing can be better eſtabliſhed than that the owner of a ſhip can only abandon in caſe of a total loſs. The caſes which have been cited went upon that ground. In the caſe of *Jenkins* v. *Mackenzie*, though the ſhip was brought into port, yet the capture, as between the aſſurer and aſſured, was a total loſs. But *there is no inſtance where the owner can abandon, unleſs at ſome period or other of the voyage, there has been a total loſs.* No ſuch event has happened here; for the jury have expreſsly found, that the loſs amounted only to 48*l.* *per cent.* Even allowing *total loſs* to be a technical expreſſion, yet the manner, in which the plaintiff's counſel has ſtated it, is rather too broad. It has been ſaid, that the inſurance muſt be taken to be on the ſhip as well as on the voyage; but the true way of conſidering it is this: *it is an inſurance on the ſhip for the voyage.* If either the ſhip, or the voyage be loſt, that is a total loſs; but here neither is loſt. The caſe of *Hamilton* v. *Mendes* is deciſive. Judgment for defendant.

Vide ſupra.

Furneaux v. Bradley. East. 20 Geo. 3.

In another caſe, an action was brought on a policy of inſurance on the *Prince of Wales*, in port or at ſea, for ſix months, from the 18th *July* 1777. The ſhip in queſtion was in government ſervice, bound from *Cork* to *Quebec*. She arrived there, but the ſeaſon being too far advanced before ſhe was ready to return, ſhe was removed into the baſon; but on the 19th *November*, ſhe was driven from thence by a field of ice, and damaged by running on the rocks. The condition of the ſhip could not be examined till *April* following, after the expiration of the policy. She was then, however, found to be bulged and much injured, but not thought irreparably ſo. In

* P. 167

* the progreſs of the repair, difficulties aroſe for want of materials; and the captain, after conſulting the merchants and agents in the country, ſold her. An account was made up, charging the inſurers with the whole amount, and crediting them with the ſums for which the ſhip ſold, as ſalvage.

Lord *Mansfield*, at the trial, ſaid; the great point in the cauſe is, whether this is a total loſs by this accident. It is a

new

new queſtion: upon which I ſhall reſerve a caſe for the opinion of the court. After argument by counſel on both ſides, his Lordſhip ſaid, the juſtice of the caſe ſeemed to be, that the loſs in *November* ſhould be taken as an *average*, not *a total* one; and that the whole court were of opinion, that the ſhip ſhould be conſidered as damaged on the 19th of *November*, but not *totally loſt*.

Theſe caſes, and the judgments upon them, have been cited at length, becauſe the principles of abandonment are ſo clearly and accurately defined, and are ſo aptly illuſtrated by referring them to the particular circumſtances ariſing in thoſe cauſes, that it would be abſurd to inſiſt more upon the ſubject; as the reader muſt from them be able to collect every thing relative to abandonment. Nor let it be objected, that thoſe were almoſt all caſes of abandonment after a capture; for many of the rules there laid down were general in their nature, comprehending caſes of wreck, and detention, *mutatis mutandis*, as well as thoſe of capture. This will be beſt explained, by putting two poſſible caſes.

Suppoſe a neutral ſhip is arreſted, and detained by a foreign prince by an embargo, the owner immediately, upon hearing of this accident, would have a right to abandon; becauſe no man is bound to wait the event of an embargo. But if the ſame ſhip, that brings the account of the embargo, ſhould alſo inform him, that the embargo was taken off, that the ſhip had only been detained two or three days, that very trifling or no damage had ariſen, then it is impoſſible to ſay that the merchant may abandon; becauſe, as we have ſeen, it is a principle of good ſenſe, that a man cannot make his election, whether he will abandon or not, till he receive advice of the loſs; and if by the ſame conveyance, it appear that the peril is over, and the thing inſured is in ſafety, he has loſt his election entirely; * becauſe he has, and can have no right to abandon when his property is ſafe.

2 Burr. 696.

2 Burr. 1211

* P. 168

The ſame principle governs in the caſe of wreck; for let us ſuppoſe a trunk of bullion, as in the caſe of *Da Coſta* v. *Firth*, to be the property inſured; and that, the ſhip being wrecked, this trunk of courſe goes to the bottom; the owner would inſtantly be entitled to abandon to the underwriter, and to call, upon him to contribute, as in caſe of a total loſs. But if it ſhould ſo happen, that before the action was brought, or before the offer was made to abandon, the bullion ſhould be recovered, and reſtored to the owner, at the place of deſtination, upon paying a moderate ſalvage; in that caſe, it would fall within the rule of *Hamilton* v. *Mendes*; and the aſſured would only be entitled to recover an indemnity, according to the nature of his caſe, at the time when the action was brought; conſequently he would not be allowed to abandon.

4 Burr. 1966.

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Manning, v. Newnham. Trin. 22. Geo. 3.

But it has been ſettled alſo by a ſolemn deciſion of the Court of *King's Bench*, in what caſes a loſs ſhall be deemed to be total, after an accident by perils of the ſea. A policy was effected in *London* upon the *ſhip Grace*, her "*cargo* and *freight*, at and "from *Tortola* to *London*, warranted to depart on or before the "firſt of *Auguſt*, 1781. The ſhip valued at 2470*l.* the freight at "2250*l.* and the cargo at 12400*l.* At a premium of 25 "guineas *per cent.* to return 10 *per cent.* if ſhe depart the "*Weſt Indies* with convoy for *England* and arrives." At the head of the ſubſcriptions is the following declaration, *viz. On ſhip, freight and goods, warranted free of particular average.* This ſhip with her cargo was a *Dutch* prize taken by a privateer of *Tortola*, and was there condemned; during the whole of her ſtay at *Tortola*, (four or five months) ſhe was never unloaded. On the firſt of *Auguſt* the whole fleet of merchantmen got under way, under the convoy of the *Cyclops*, &c. but not being able to get clear of the iſlands that day, they caſt anchor during the night, and the next day got clear of the iſlands. About 10 o'clock on the 2d of *Auguſt*, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain and make water ſo faſt, that the crew were obliged to work both pumps; and, on the third, the captain made a ſignal of diſtreſs: in conſequence of which, ſhe was obliged to return to *Tortola*,

* P. 169 * under protection of one of his majeſty's ſhips. The captain made his proteſt, and a ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo, and that ſhe could not be repaired in any of the *Engliſh* iſlands in the *Weſt-Indies*: and that many of the ſugars in the bilge and lower tier were waſhed out, and ſeveral of the caſks broke and in bad order. The ſhip and the whole of the cargo were ſold accordingly at *Tortola*. The aſſured claim a total loſs of ſhip, cargo and freight, which the jury thought right, and found accordingly. A motion was made for a New Trial, which upon full conſideration was refuſed.

Lord *Mansfield*, after ſtating the evidence, and that his prejudices at the trial were in favour of the underwriters, proceeded thus: but notwithſtanding this inclination of my opinion, upon full conſideration we think the jury have done right. If by a peril inſured the voyage is loſt, it is a total loſs; otherwiſe not. In this caſe the ſhip has an irreparable hurt within the policy; this drives her back to *Tortola*, and there is no ſhip to be had there, which could take the whole cargo on board. There were only two ſhips at *Tortola*, and both could not take in the cargo. To ſhew how completely the voyage was loſt, and that no ſhip could be got, the aſſured have not been able to ſend that part of the goods, which they purchaſed, forward to *London*. It is admitted there was a total loſs on the freight becauſe the ſhip could not perform the voyage.

age. The ſame argument applies to the ſhip and cargo. It is a contract of indemnity; and the inſurance is that the ſhip ſhall come to *London*. Upon turning it in every view, we are of opinion that the voyage was totally loſt, and that is the ground of our determination. The rule was diſcharged.

From what was ſaid in a former chapter, and from the caſes juſt recited, it will appear, that in wager policies, it was uſual to ſet up a total loſs between third perſons, for the purpoſe of their wager, though in fact the ſhip was ſafe, and reſtored to the owner. But in ſome of theſe caſes, the loſs was held not to be total; and as in moſt of them general verdicts were given, and no report of the judge's direction is to be found, it is now impoſſible to determine upon what grounds * the deciſions turned. As has been truly ſaid, however, theſe queſtions never can ariſe again, becauſe they originated from wager policies, which are now prohibited by law. But as the caſe of *Pole v. Fitzgerald* was one of thoſe, in which the majority of the judges, and the Houſe of Lords held, that though the ſhip might be deemed loſt, for a time; yet as ſhe was afterwards recovered, the event of a total loſs had not finally happened, according to the conſtruction of the wager; and as it has frequently occurred in the courſe of our enquiries, it may be proper to give a ſhort account of it in this place.

Ch. 4. p. 69.

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It was an action on a policy of inſurance on the ſhip *Goodfellow* privateer, at and from *Jamaica*, to any ports and places where and whatſoever, at ſea or ſhore, a cruiſing from place to place, for and during the term and ſpace of four calendar months; the ſhip was valued at 1000*l. without further account*, and free from average. The defendant in 1744, had ſubſcribed 100*l.* and the plaintiff declared for a total loſs of the voyage by a mutiny of the men.

Fitzgerald v. Pole. 5. Brown's Parl. Caſes 131.

The cauſe came on to be tried at *Guildhall* before the Lord Chief Juſtice *Lee*, when a ſpecial verdict was found, ſtating, That the defendant had ſubſcribed the policy, ſtated in the declaration: that the *Goodfellow* was an *Engliſh* privateer, duly commiſſioned; was ſafe at *Jamaica* on the 14th of *June* 1744, and ſailed from thence the ſame day: that on the 10th of *July*, 1744, ſhe took a *French* prize of the value of 4200*l.* ſterling: that afterwards the ſaid ſhip was ſailing on her cruiſe, for a port or place called the *River of Dogs*, to fetch water; and while ſhe was ſo ſailing towards the *River of Dogs*, and within the four months mentioned in the policy, the crew mutinied againſt the captain and his officers; and by force carried the ſaid ſhip againſt the will of the captain and officers; who could not reſiſt, to *Jamaica*: and before her arrival there, cauſeleſsly, againſt the conſent of the ſaid captain, ſeized the boat, fire-arms and cutlaſſes, carried off the ſame, and deſerted the privateer, by which the voyage and cruize were totally prevented and loſt

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for the remainder of the four months: that the ſhip arrived at *Jamaica*, and was there in good ſafety at and after the end of the four months; but was prevented by the mutiny and deſer-

171 *tion, from further purſuing her cruiſe: that the perſon inſured had intereſt in the ſhip to the amount of the ſum inſured.

This caſe was argued in the King's Bench, and judgment was given for the plaintiff. Upon a writ of error, the Court of Exchequer Chamber unanimouſly reverſed that judgment. The Houſe of Lords afterwards confirmed the judgment of reverſal, being of opinion, with the majority of the judges, that the inſurer being by the terms of the policy, free from all average, the plaintiff could not be entitled to recover, but in caſe of a total loſs; and the ſhip being found, by the ſpecial verdict, to be in good ſafety, at her proper port, at and after the end of the four months, for which the inſurance was made, there could be no loſs. The counſel for the plaintiff cited many caſes, in which the plaintiffs had judgment for a total loſs, although the ſhips remained in being; moſt of which have already been referred to in the chapter upon capture. But thoſe caſes were abſolutely denied by the other ſide; or, if admitted at all, it was inſiſted, that they made for the defendant. This circumſtance, among many others, ſtated in the introduction of this work, ſerves to evince the great ſuperiority which the modern practice of our courts, in matters of inſurance, has over the ancient.

Vide ante c. p. 73. 2. Burr. 1200.

See the Introduction ſub fine.

In many of the maritime countries on the continent of *Europe*, the time, within which the abandonment muſt be made, is fixed by poſitive regulation. Thus in *France*, it is ordained, that all ceſſions or abandonments, as well as demands in virtue of the policy, ſhall be made as follows: In ſix weeks, for loſſes happening on the coaſts of the country, where the inſurance was made: in three months, in other provinces of our kingdom: in four months, on the coaſt of *Holland*, *Flanders* and *England*: in a year, in *Spain*, *Italy*, *Portugal*, *Barbary*, *Muſcovy*, *Norway*: and in two years, for the coaſts of *America*, the *Braſils*, *Guinea*, and other diſtant countries. When theſe terms are elapſed, the demands of the aſſured ſhall not afterwards be admitted. In caſes of detention, the ſame ordinance provides, that the abandonment ſhall not be made before ſix months, if it happen in *Europe* or *Barbary*. If in a more diſtant country, in a year; both to commence from the day of

Ord. of Lew. 14. tit. Inſurance art. 48.

Art. 49.

* P. 172 *the notifying this detention to the inſurers. A ſimilar regulation to that laſt mentioned is to be found in the ordinances of

2 Mag. 416. *Bilboa*.

In the law of *England* till lately we had no limitation of time, with reſpect to abandonment, at leaſt that I was able to find: and I believe that none ſuch exiſted. But from what has been ſaid in the preceding part of this chapter, it would appear, that the

the insured has a right to call upon the underwriter for a total loss, and of course to abandon, as soon as he hears of such a calamity having happened, his claim to an indemnity not being at all suspended by the chance of a future recovery of part of the property lost: because, by the abandonment, that chance devolves upon the underwriter; by which means the intention of the contracting parties is fully answered, and complete justice is done.

In a very modern decision it has been held by the court of *King's Bench*, that as soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not: and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never afterwards recover for a total loss. This determination was certainly equitable and just; for otherwise it was impossible to say, at what time the responsibility of the underwriter was to end, they would be liable to be called upon to contribute at any indefinite period, and a great deal of uncertainty would be introduced into this system of law.

Mitchell v. Edie. 1 Term Rep. 608.

But if the insured, hearing that his ship is much disabled and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. Because the reason why notice of abandonment is deemed necessary, it to prevent surprize or fraud upon the underwriter: but in the case put, they have, by their own act, superseded the necessity of notice.

Da Costa v. Newnham. 2 Term Rep. 407.

* We have thus taken a view, in this and the eight preceding chapters, of the nature of that instrument by which the contract of insurance is effected; and of the different modes, by which it may be construed: we have treated of the various losses, to which the underwriter subjects himself by that contract; we have shewn, when the losses are to be considered as partial, when as total; and in what cases, and under what circumstances, the insured shall be allowed to abandon to the underwriter. The course of our enquiry now naturally leads us to observe in what instance the insurer is discharged from any responsibility; either on account of the contract being void, from its commencement, by reason of some radical defect; or because the insured has failed to perform some of those conditions, necessary to be fulfilled on his part, before he can call upon the insurer for an indemnity.

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CHAP. X.

*CHAPTER THE TENTH.

Of Fraud in Policies.

* P. 174

IN treating of thoſe cauſes, which make policies void from the beginning, or in other words, which abſolutely annul the contract, it will be proper in the firſt place to conſider, how far it will be affected by any degree of fraud. In every contract between man and man, openneſs and ſincerity are indiſpenſably neceſſary to give it its due operation; becauſe, fraud and cunning once introduced, ſuſpicion ſoon follows, and all confidence and good faith are at an end. No contract can be good, unleſs it be equal; that is, neither ſide muſt have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in thoſe of inſurance; becauſe the underwriter computes his riſk entirely from the account given by the perſon inſured, and therefore it is abſolutely neceſſary to the juſtice and validity of the contract, that this account be exact and complete. Accordingly the learned judges of our courts of law, feeling that the very eſſence of inſurance conſiſts in a rigid attention to the pureſt good faith, and the ſtricteſt integrity, have conſtantly held that it is vacated and annulled by any the leaſt ſhadow of fraud or undue concealment.

2 Black. Com. 460. Grot. de jure belli, lib. 2. c. 12. ſ. 23. Paſſendorff de jure nat. l. 5. c. 9. ſ. 8. Bynkerſhoek queſt. jur. priv. l. 4. c. 26. Ord. de Lew. 14. t. 38. 1 Black. 594. 3 Burr. 1909.

After what has been ſaid, it will hardly be neceſſary to mention, that both parties, the inſurer and inſured, are equally bound to diſcloſe circumſtances, that are within their knowledge; and therefore if the inſurer, at the time he underwrites, can be proved to have known that the ſhip was ſafe arrived, the contract will be equally void, as if the inſured had concealed from him ſome accident, which had befallen the ſhip.

In peruſing the numerous caſes and deciſions, which, I am ſorry to ſay, are to be found in our books under this head, it occurred to me, that they were liable to a threefold diviſion:

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* 1ſt, The allegation of any circumſtances, as facts, to the underwriter, which the perſon inſured knows to be falſe: 2dly, The ſuppreſſion of any circumſtances, which the inſured knows to exiſt; and which, if known to the underwriter, might prevent him from undertaking the riſk at all, or if he did, might entitle him to demand a larger premium: and, laſtly, a miſrepreſentation. The laſt of theſe, a *miſrepreſentation* ſeems to fall under the firſt head, the *allegatio falſi*; and ſo in, ſome meaſure it does; becauſe wherever a perſon knowingly and wilfully miſrepreſents any thing, he aſſerts a falſehood. But it

Dougl. 247.

was

was thought neceſſary to make a diviſion for itſelf; becauſe if a *material* fact be miſrepreſented, though by miſtake, the contract is void, as much as if there had been actual fraud: for the underwriter has computed his riſk upon information, which was falſe. Of each of theſe in order.

Nothing can be ſo clear a proof of fraud, as the aſſertion of the truth of ſome circumſtance, which the perſon aſſerting it muſt know to be falſe. In our reporters, we do not meet with ſo many caſes under this diviſion of the ſubject, as under the two following: and indeed, from the nature of the thing, it is impoſſible we ſhould; becauſe in ſuch a caſe, the only queſtion is, did the inſured aſſert this to be the truth. If he did, the enquiry is at an end; becauſe we are now preſuming it to be the aſſertion of a circumſtance within his own knowledge. This being a mere queſtion of fact, is not a ſubject for a reporter. But in the other caſes, there is greater room for inveſtigation; we may properly enquire, for inſtance, whether the inſured was bound to diſcloſe this fact; whether the miſrepreſentation was in a material part: and many other ſimilar queſtions of which we ſhall ſee the neceſſity hereafter.

The few following caſes will evidently ſhew, that our idea was right, when we ſuppoſed, that under the head of the *allegatio falſi*, the only enquiry would be, whether the perſon inſured, knowing the contrary, aſſerted a particular thing to be true.

In a caſe before Lord Chief Juſtice *Holt*, in the reign of *William* and *Mary*, that learned judge held, that if the goods * were inſured as the goods of an *Hamburgher*, who was an ally, and the goods were, in fact, the goods of a *Frenchman*, who was an enemy; it was a fraud, and that the inſurance was not good. Skinner 327. * P. 176

In another caſe, a letter being received, ſtating, that a ſhip ſailed from *Jamaica* for *London*, on the 24th of *November*, after which an inſurance was made, and the agent told the inſurer, that the ſhip ſailed the latter end of *December*; this was alſo held by Lord Chief Juſtice *Lee* to be a fraud, and the defendant had a verdict. Roberts v. Fonnereau. Sitt. at Guildhall after Trin. Term 1742.

Upon a ſpecial caſe reſerved for the opinion of the court, the following circumſtances appeared.

It was an action on the caſe, brought for the recovery of a total loſs, on a policy of inſurance made on goods and merchandizes on board the ſhip *Bona Fortuna*, at and from *North Bergen* to any ports or places whatſoever, until her ſafe arrival in *London*. It was underwritten thus: "Warranted "neutral ſhip and property." The defendant underwrote the policy for 150*l*. The defendant pleaded the general iſſue, and paid into court the premium received by him for the ſaid inſurance Woolmer v. Muilman. 3 Burr. 1419. 2 Black. 427.

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rance. This cauſe came on to be tried at *Guildhall* before Lord *Mansfield*; when it was admitted, that the plaintiff had intereſt on board the ſhip to a large value, to the amount of the ſum inſured. The ſhip with the goods and merchandizes ſo loaden, and being on board her, after her departure from *North Bergen*, and before her arrival in *London*, proceeding on her voyage, was, by the force of winds and ſtormy weather, wrecked, caſt away and ſunk in the ſeas; and the ſaid goods and merchandizes were thereby wholly loſt. It was expreſsly ſtated, "that the ſhip or veſſel, called the *Bona Fortuna*, and "the property on board, at and before the time ſhe was "loſt, were not neutral property, as warranted by the ſaid "policy."

Lord *Mansfield*, and the reſt of the court, were of opinion, that it was too clear a caſe to bear an argument. This was *no contract*; for there was a falſehood, in reſpect of the condition of the thing inſured: becauſe the plaintiff inſured neutral property, and this was not neutral property.

* P. 177 * From the preceding caſe, we may collect this principle, that a falſe aſſertion in a policy will vitiate the contract; even though the loſs happen in a mode not affected by that falſity.

Another obſervation is ſuggeſted by the peruſal of the caſe of *Woolmer* and *Muilman*. It aroſe upon a warranty; and the learned judges declared, that the warranty being falſe, there was *no* contract. Now, as we ſhall ſee, when we come to the chapter on warranties, the general rule with reſpect to them is this, that the noncompliance with them does not vacate the contract from the beginning; but it amounts to much the ſame thing, namely, that the inſured, not having complied with thoſe conditions, which he had taken upon himſelf to perform, cannot recover againſt the underwriter.

But the following anſwer is ſubmitted, which, if allowed will reconcile any ſeeming difference, that ariſes in the caſes upon the ſubject. Wherever a man warrants a thing to be true, which, at the time he does ſo, he muſt unavoidably know to be falſe; it comes under the *allegatio falſi*, and the contract is void, as in the caſe juſt reported. But if he warrant or undertake that a certain thing *ſhall* be done, for inſtance, that the ſhip ſhall ſail with convoy, or on a particular day; theſe being circumſtances, materially varrying the riſk, the underwriter ſhall not be reſponſible for a loſs, if they are not complied with: but the contract is not void from the beginning, nor does the inſured incur any moral guilt; becauſe they do not depend entirely for their performance upon the will of the perſon inſured, nor could they be within his knowledge, at the time he entred into the contract.

A ſhort

A ſhort time after the caſe of *Woolmer* againſt *Muilman* had been decided, another very ſimilar caſe came on at *Guildhall* before Lord *Mansfield*.

It was an action on a policy of inſurance on goods laden on board ſuch a ſhip, warranted a *Portugueze*. The inſurance was made during the *French* war, when the premium would have been much higher on an *Engliſh* ſhip. The plaintiff gave partial evidence of her being a *Portugueze*; and that ſhe was * obliged, on account of perils of the ſea, to put into a *French* port, by which the cargo was ſpoiled. This was admitted by the defendant, who contended that, during her ſtay at the *French* port, ſhe was libelled, and condemned as not being *Portugueze*: and that although the goods were loſt by a different peril, yet in fact the ſhip was not *Portugueze*, (being inſured as ſuch) and that this viiiated the policy *ab initio*—and this was agreed to be law. In order to prove that ſhe was not *Portugueze*, the defendant produced the ſentence of condemnation, and the confirmation thereof in the courts of *France*; and an anſwer of the preſent plaintiff in the court of Chancery here, by which it was admitted, that the ſhip was condemned as not being, or under pretence of not being, *Portugueze*.

Fernandes v. DeCoſta. Sittings after Hil. 4 G. 3.

* P. 178

Lord *Mansfield*.—As the ſentence is always general (without expreſſing the reaſon of the condemnation) atteſted copies of the libel ought in ſtrictneſs to have been produced, to ſhew upon what ground the ſhip was libelled againſt. But as the plaintiff has by his anſwer in Chancerry admitted that ſhe was condemned, as not being *Portugueze*; when added to the expreſſion uſed in the ſentence of confirmation, *that the ſhip was condemned in the court of prizes*, there is ſufficient evidence for us to proceed upon. The defendant, the underwriter, had a verdict.

The ſecond ſpecies of fraud, which affects inſurances, is the concealment of circumſtances, known only to one of the parties entering into the contract. Upon this head, the principles of law are perfectly clear, free from doubt or poſſibility of error. Concealment of circumſtances vitiates all contracts, upon the principles of natural law. Inſurance is a contract of ſpeculation. The facts, upon which the riſk is to be computed, lie, for the moſt part, within the knowledge of the inſured only. The underwriter muſt therefore rely upon him for all neceſſary information; and muſt truſt to him, that he will conceal nothing, ſo as to make him form a wrong eſtimate. If a miſtake happen, without any fraudulent intention, ſtill the contract is annulled, becauſe the riſk is not the ſame, which the underwriter intended. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his belief of the contrary.

1 Black. Rep 465.

1 Black. Rep. 594.

Theſe

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* These principles have been uniformly ſupported by a variety of deciſions.

* P. 179 DaCoſta v Scandret in. Chancery. 2 P. Will. 170.

One having a doubtful account of his ſhip, that was at ſea, namely, that a ſhip, deſcribed like his, was taken, inſured her, without giving any notice to the inſurers of what he had heard either as to the hazard, or the circumſtances, which might induce him to believe that his ſhip was in great danger, if not actually loſt. The inſurers bring a bill for an injunction, and to be relieved againſt the inſurance as fraudulent.

Lord Chancellor *Macclesfield*.—The inſured has not dealt fairly with the inſurers in this caſe; he ought to have diſcloſed to them what intelligence he had of the ſhip's being in danger, and which might induce him, at leaſt, to fear that it was loſt, though he had no certain account of it. For if this circumſtance had been diſcovered, it is impoſſible to think, that the inſurers would have inſured the ſhip at ſo ſmall a premium as they have done; but either would not have inſured at all, or would have inſiſted on a larger premium, ſo that the concealment of this intelligence is a fraud. Whereupon the policy was decreed to be delivered up with coſts, but the premium to be paid back, and allowed out of the coſts.

Seaman v. Fonnereau. 2 Stra. 1183.

In another caſe it appeared, that on the 25th of *Auguſt*, 1740, the defendant underwrote a policy from *Carolina* to *Holland*. It came out in evidence, that the agent for the plaintiff had on the 23d of *Auguſt*, (two days before the policy was effected) received a letter from *Cowes*, dated the 21ſt of *Auguſt*, wherein it is ſaid: "On the 12th of this month, I was in company with the ſhip *Davy*, (the ſhip in queſtion) at twelve at night "loſt ſight of her all at once; the captain ſpoke to me the day "before that he was leaky, and the next day we had a hard "gale." The ſhip, however, continued her voyage till the 19th of *Auguſt*, when ſhe was taken by the *Spaniards*; and there was no pretence of any knowledge of the actual loſs at the time of the inſurance, but it was made in conſequence of a letter received that day from the plaintiff abroad, dated the 27th *June* before.

* P. 180

* Lord Chief Juſtice *Lee* declared, that as theſe are contracts upon chance, each party ought to know all the circumſtances. And he though it not material, that the loſs was not ſuch an one as the letter imported; for thoſe things are to be conſidered in the ſituation of them at the time of the contract, and not to be judged of by ſubſequent events. He therefore thought it a ſtrong caſe for the defendant. The jury found accordingly.

Hodgſon v. Richardſon. 1 Black. Rep. 463.

In an action on a policy of inſurance, the caſe was, that the ſhip was inſured *at and from Genoa*, liable to average; her loading conſiſting of pot-aſh, verdigreaſe, cotton, and other periſhable commodities. This loading was put on boatd *at Leghorn* the 10th of *Auguſt*, and the veſſel had lain at *Genoa* above

above five months, being originally bound for *Dublin*; but loſing her convoy, ſhe put into *Genoa* the 13th of *Auguſt*, and lay there till the 5th of *January*, when ſhe ſailed. And the inſurance was made the 20th of *January*; at which time theſe circumſtances were known to the aſſured, but not communicated to the underwriter. A few days after ſhe put to ſea, ſhe was ſhattered by a ſtorm, and the cargo conſiderably damaged. The jury found a verdict for the plaintiff; and a new trial was moved for on this ground, that the policy was bad *ab initio*, for want of a due diſcloſure of the circumſtances.

Lord *Mansfield*—The queſtion is, whether here was a ſufficient diſcloſure; that is, whether the fact concealed was material to the riſk run. This is a matter of fact; and if material, the conſequence is matter of law, that the policy is bad. Now who can ſay, that no riſk was run, during the five months ſtay at *Genoa*, or no damage happened in that period? The policy is founded on miſrepreſentation: the ſhip is inſured "at and "from *Genoa* to *Dublin*; the adventure to begin from the load-"ing, to equip for this voyage." This plainly implies, that *Genoa* was the port of loading: and at the trial, all the witneſſes ſaid, that by uſage, it was material to acquaint the underwriter, whether the inſurance was to be at the commencement or in the middle of a voyage.

Mr. Juſtice *Wilmot*.—The fact diſcloſed by this policy is not true, that *Genoa* is the loading port; for ſo it muſt be underſtood. In ſuch caſes I will not ſpeculate upon the materi-* ality, or immateriality of the fact. Not but that I think, the length of the ſtay at *Genoa* is very material, in caſe of ſuch periſhable commodities. * P. 181

Mr. Juſtice *Yates*.—The concealment of material circumſtances vitiates all contracts, upon the principles of natural law. A man, if kept ignorant of any material ingredient, may ſafely ſay, it is not his contract. And I think this fact material, for the reaſons before given. A new trial was accordingly granted.

The doctrine, ſo accurately laid down in the preceding caſes, has ſince been the principle, on which ſeveral verdicts have been given, in cauſes of this nature; a few of which it will be proper to mention.

An action was brought on a policy of aſſurance on goods, on board the *Matty* and *Betty*, at and from the coaſt of *Africa* to her laſt diſcharging port in the *Britiſh Weſt Indies*. The objection made to paying the loſs was, that there had been a material concealment, or miſrepreſentation of the true ſtate or ſituation of the ſhip and voyage at the time of underwriting the policy. The ſhip had been ſent out to trade on the coaſt of *Africa*, with directions to proceed from thence to the *Britiſh Weſt Indies*, and to ſtop at *Barbadoes*, if ſhe could get a *ſale* Ratcliffe and another v. Shoolbred. Sit. at Guildh. after Trin. 1780.

if

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if not, to proceed to *Montego-Bay*. On the 2d of *October* ſhe ſailed from *St. Thomas's* on the coaſt of *Africa*, with a cargo of ſlaves, and was taken on the 6th of *December* following by an *American* privateer. A letter was received by a houſe at *Liverpool* on the 21ſt of *February*, mentioning, that the ſhip was well, and had ſailed from *St. Thomas's* on the 2d of *October*. This information was communicated next day to the plaintiffs, who in conſequence of it, wrote the ſame evening to two different brokers, to get a *new* inſurance on the ſhip, there having been one before, and another on the cargo, which laſt was the ſubject of the preſent action. In the inſtructions to the brokers, the plaintiffs ſay nothing of the ſhip from the time of her firſt ſailing; but to one of the brokers, they wrote thus; "we ſhould be glad, if you would get us "600*l.* more on the ſhip. as ſhe is *rather long*, and we think "it not prudent to run ſo large a riſk at ſo critical a time.
P. 182 *"We expect to hear ſoon of her." It had afterwards occurred, that the policy might be effected, if intimation was not given of the letter, which had been received. The broker, therefore, by direction of the plaintiff, added to the inſtructions: "the above ſhip was on the coaſt the 2d of *Oc*-"*tober*;" but ſaid nothing of her having ſailed from *St. Thomas*. The policy was dated the 21ſt of *March*.

Lord *Mansfield*—The inſured is bound to repreſent to the underwriter all the material circumſtances of the ſhip and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable: *a fortiori*, if he ſuppreſs or miſrepreſent from fraud. The queſtion is, whether this be one of thoſe caſes, which is affected by miſrepreſentation or concealment. If the plaintiffs concealed any material part of the information they received, it is a fraud; and the inſurers are not liable. The jury found for the defendant agreeably to his lordſhip's direction.

Fillis v. Brutton. Sittings at Guildh. after Hil. 1782.

In another caſe, the policy was on the brig *Richard* at and from *Plymouth* to *Briſtol*. Several letters paſſed between the plaintiff and the broker, who effected the policy, as to the premium at which the inſurance could be made: at laſt, it was underwritten at 4 guineas *per cent*. The broker's inſtructions ſtated *the ſhip ready to ſail on the* 24th *of December*. The broker repreſented to the underwriter, that the ſhip was in port, when in fact ſhe had ſailed the 23d of *December*.

Lord *Mansfield* ſaid, that this was a material concealment and miſrepreſentation. The jury, however, heſitated: his lordſhip then laid down the following as general principles.—— In all inſurances, it is eſſential to the contract, that the aſſured ſhould repreſent the true ſtate of the ſhip to the beſt of his knowledge. On that information, the underwriters engage. If he ſtate that as a fact, which he does not know to be true, but

but only believes it; it is the ſame as a warranty. He is bound to tell the underwriters truth. In the preſent inſurance, the only material point is this: had the ſhip ſailed, or was ſhe in port? Upon this, the jury found for the defendant.

But although the rule is laid down thus generally, that one of the contracting parties is bound to conceal nothing from the * other; yet it is by no means ſo general, as not to admit of an exception. *Aliud eſt celare, aliud tacere.* There are many matters, as to which the inſured may be innocently ſilent. 1ſt, As to what the inſurer knows, however he came by that knowledge. 2d. As to what he ought to know. 3d. As to what leſſens the riſk. An underwriter is bound to know political perils, as to the ſtate of war or peace. If he inſure a privateer, he needs not be told her deſtination. And, as men reaſon differently from the ſame facts, he needs not be told another's concluſions from known facts.

* P. 183

1 Black. Rep. 593.

Theſe ideas were fully entered into, explained, and illuſtrated in the argument of Lord *Manſfield*, in delivering the opinion of the court in *Carter*, v. *Boehm*

Carter v. Boehm. 3 Burr. 1905. and 1 Black. Rep. 593. Vide ante c. 1. p. 12.

This was an inſurance cauſe upon a policy, intereſt or no intereſt, without benefit of ſalvage. The inſurance was made by the plaintiff, for the benefit of his brother, governor *George Carter*. The jury found a verdict for the plaintiff; upon which a new trial was moved for, on the ground, that circumſtances had not been ſufficiently diſcloſed. Lord *Manſfield* reported the evidence given at the trial; by which it appeared, that it was a policy of inſurance for one year, namely, from the 16th of *October* 1759, to the 16th *October* 1760, for the benefit of the governor of *Fort Marlborough*, *George Carter*, againſt the loſs of *Fort Marlborough*, in the iſland of *Sumatra*, in the *Eaſt Indies*, by its being taken by a foreign enemy. The event happened: the fort was taken, by Count *D'Eſtaigne* within the year. The firſt witneſs was *Cawthorne*, the broker, who produced the memorandum given by the governor's brother (the plaintiff) to him; and the uſe made of theſe inſtructions was to ſhew, that the inſurance was made for the benefit of governor *Carter*, and to inſure him againſt the taking of the fort by a foreign enemy. Both parties had been long in Chancery; and the depoſitions, there made on both ſides, were read as evidence upon this trial. It was objected on behalf of the defendant, to be a fraud, by concealment of circumſtances, which ought to have been diſcloſed; and particularly the weakneſs of the fort, and the probability of its being attacked by the *French*: which concealment was offered to be proved by two letters The firſt was a letter from the * governor to his brother *Roger Carter*, his truſtee, and the plaintiff in this cauſe: the ſecond was from the governor to the *Eaſt India* Company.

* P. 184

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The evidence in reply to this objection, conſiſted of three depoſitions in chancery; ſetting forth, that the governor had 20,000*l.* in effects; and had only inſured 10,000*l.*: and that he was guilty of no fault in defending the fort. The firſt of theſe depoſitions, was captain *Tryon's*, which proved, that this was not a fort proper, or deſigned to reſiſt *European* enemies; but only calculated for defence againſt the natives of the iſland of *Sumatra:* that the governor's office is not military, but only mercantile: and that *Fort Marlborough* is only a ſubordinate factory to *Fort St. George*. There was no evidence to the contrary; and a ſpecial jury found a verdict for the plaintiff.

After argument at the bar, upon the motion for a new trial and time taken by the court to deliberate, their unanimous opinion was delivered by

Lord *Manſfield*.—This is a motion for a new trial. In ſupport of it, the counſel for the defendant contend, that ſome circumſtances in the knowledge of governor *Carter*, not having been mentioned at the time the policy was underwritten, amount to a concealment, which ought, in law, to avoid the policy. The counſel for the plaintiff inſiſt, that the not mentioning theſe particulars does not amount to a concealment, which ought, in law, to avoid the policy; either as a fraud, or as varying the contract. 1ſt, It may be proper to ſay ſomething, in general, of concealments which avoid a policy. 2dly, To ſtate particularly the caſe now under conſideration. 3dly, To examine, whether the verdict, which finds this policy good, although the particulars objected were not mentioned, is well founded.

Firſt, inſurance is a contract upon ſpeculation. The ſpecial facts, upon which the riſk is to be computed, lie moſt commonly in the knowledge of the inſured only. The underwriter truſts to his ſtatement, and proceeds upon confidence, that he does not keep back any circumſtances within his knowledge, to miſlead the underwriter into a belief that the circumſtance does not exiſt, and to induce him to eſtimate the riſk, as if it did not exiſt. The keeping back ſuch circumſtance is a fraud; and therefore the policy is void. Although the ſup-

* P. 185

* preſſion ſhould happen through miſtake, without any fraudulent intention; yet ſtill the underwriter is deceived, and the policy is void: becauſe the riſk run is really different from the riſk underſtood, and intended to be run at the time of the agreement. The policy would equally be void againſt the underwriter, if he concealed any thing; as, if he inſured a ſhip on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be

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innocently ſilent as to grounds open to both, to exerciſe their judgments upon. *Aliud eſt celare; aliud tacere: neque enim id eſt celare quicquid reticeas; ſed cum quod tu ſcias, id ignorare, emolumenti tui cauſâ, velis eos, quorum interſit id ſcire.* This definition of concealment, reſtrained to the efficient motives, and preciſe ſubject of any contract, will generally hold to make it void, in favour of the party miſled by his ignorance of the thing concealed. There are many matters, as to which the inſured may be innocently ſilent; he need not mention what the underwriter knows, *ſcientia utrinque par pares contrahentes facit.* An underwriter cannot inſiſt that the policy is void, becauſe the inſured did not tell him what he actually knew, what way ſoever he came to the knowledge. The inſured needs not mention what the underwriter ought to know; what he takes upon himſelf the knowledge of; or what he waves being informed of. The underwriter needs not be told what leſſens the riſk agreed, and underſtood to be run by the expreſs terms of the policy. He needs not be told general topics of ſpeculation: as for inſtance, the underwriter is bound to know every cauſe, which may occaſion natural perils; as the difficulty of the voyage; the kind of ſeaſons; the probability of lightning, hurricanes, and earthquakes. He is bound to know every cauſe, which may occaſion political perils; from the rupture of ſtates; from war, and the various operations of war. He is bound to know the probability of ſafety, from the continuance and return of peace; from the imbecility of the enemy, through the weakneſs of their councils, or their want of ſtrength. If an underwriter inſure private ſhips of war, by ſea, and on ſhore, * from ports to ports, and from places to places, any where, he needs not be told the ſecret enterpriſes, upon which they are deſtined; becauſe he knows ſome expedition muſt be in view: and from the nature of his contract, he waves the information, without being told. If he inſure for three years, he needs not be told any circumſtance to ſhew it may be over in two: or, if he inſure a voyage with liberty of deviation, he needs not be told what tends to ſhew there will be no deviation. Men argue differently, from natural phænomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging, are open to both: each profeſſes to act from his own ſkill and ſagacity; and therefore neither needs to communicate to the other. The reaſon of the rule, which obliges the parties to diſcloſe, is to prevent fraud, and encourage good faith: it is adapted to ſuch facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reaſon to ſuſpect. The queſtion, therefore, muſt always be, "Whether there was, under all the circumſtances, at the time the policy was underwritten, a fair ſtatement, or a concealment:

Cicero de Officiis lib. 3. c. 12. 13.

* P. 186

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ment: fraudulent, if deſigned; or, though not deſigned, varying materially the object of the policy, and changing the riſk underſtood to be run."

2dly, This brings me in the ſecond place, to ſtate the caſe now under conſideration. The policy is againſt the loſs of *Fort Marlborough*, from being deſtroyed by, taken by, or ſurrendered unto, any *European* enemy, between the 16th of *October* 1759, and the 16th of *October*, 1760. The underwriter knew at the time, that the policy was to indemnify, to that amount, *George Carter* the *governor of Fort Marlborough*, in caſe the event inſured againſt ſhould happen. The governor's inſtructions for the inſurance bearing date at *Fort Marlborough*, the 22d of *September*, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the *Eaſt India* Company, which the Company offered to put into my hands; but would not deliver it to the parties, becauſe it contained ſome matters, which they did not think proper to be made public. An objection that occurred to me at the trial, whether a policy againſt the loſs of *Fort Marlborough*, for the benefit of the governor, was good; upon the principle, which does not allow a ſailor to inſure his wages. But conſidering that this place, though called a fort was really but a factory or ſettlement for trade; and that he, though called a governor, was really but a merchant: conſidering too, that the law allows a captain of a ſhip to inſure goods, which he has on board, or his ſhare in the ſhip, if he be a part owner; and the captain of a privateer, if he be a part owner, to inſure his ſhare: conſidering alſo, that the objection could not, upon any ground of juſtice, be made by the underwriter, who knew him to be governor, at the time he took the premium, and as with regard to principles of public convenience, the caſe ſo ſeldom happens (I never ſaw one before), any danger from the example is little to be apprehended: I did not think myſelf warranted, upon that point, to nonſuit the plaintiff: eſpecially as the objection did not come from the bar. Though this point was mentioned at the laſt trial, it was not inſiſted upon; nor has it been ſeriouſly argued, upon this motion, as ſufficient alone to vacate the policy: and if it had, we are all of opinion, that we are not warranted to ſay, that it is void, upon this account. Upon the plaintiff's obtaining the two former verdicts, the underwriters went into a court of Equity; where they have had an opportunity to ſift every thing to the bottom, to get every diſcovery from the governor and his brother, and to examine any witneſſes that were upon the ſpot. At laſt, after the fulleſt inveſtigation of every kind, the preſent action came on to be tried at the ſittings after laſt term. The plaintiff proved, without contradiction, that the place, called *Bencoolen* or *Fort Marlborough*, is a factory or ſettlement, but no military fort

Vide ante c. 1. p. 12.

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or

or fortreſs: that it was not eſtabliſhed for a place of arms or defence againſt the attacks of an *European* enemy; but merely for the purpoſe of trade, and of defence againſt the natives: that the fort was only intended and built to keep off the country blacks: that the only ſecurity againſt *European* ſhips of war conſiſted in the difficulty of the entrance and navigation of the river, for want of proper pilots: that the general ſtate and condition of the ſaid fort, and of the ſtrength thereof, were in general well known, by moſt perſons converſant or acquainted with *Indian* affairs, or the ſtate of the Company's factories or ſettlements; and could not keep ſecret or concealed from perſons, who ſhould endeavour, by proper enquiry, to inform themſelves: that there were no apprehenſions or intelligence of * P. 188 any attack by the *French*, until they attacked *Nattal* in *February* 1760: that on the 8th of *February* 1760, there was no ſuſpicion of any deſign by the *French*: that the governor at that time bought of the witneſs goods to the value of 4000*l.* and had goods to the value of above 20,000*l.* and then dealt for 50,000*l.* and upwards: that on the 1ſt of *April* 1760, the fort was attacked by a *French* man of war of 64 guns, and a frigate of 20 guns, under the *Comte D'Eſtaigne*, brought in by *Dutch* pilots was unavoidably taken, and afterwards delivered to the *Dutch*, the priſoners being ſent to *Batavia*. On the part of the defendant, after all the opportunities of enquiry, no evidence was offered, that the *French* ever had any deſign upon *Fort Marlborough*, before the end of *March* 1760: or that there was the leaſt intelligence or alarm, that they might make the attempt till the taking of *Nattal*, in the year 1760. They did not offer to diſprove the evidence, that the governor had acted, as in full ſecurity, long after the month of *September* 1759; and had turned his money into goods, ſo late as the 8th of *February* 1760. There was no attempt to ſhew that he had not loſt by the capture very conſiderably beyond the value of his inſurance. But the defendant relied upon a letter, written to the *Eaſt India* Company, bearing date the 16th of *September* 1759, which was ſent to *England* by the *Pitt*, captain *Wilſon*, who arrived in *May* 1760, together with the inſtructions for inſureing: and alſo a letter bearing date the 22d of *September* 1759, ſent to the plaintiff by the ſame conveyance, and at the ſame time, (which letters his lordſhip repeated.) They relied too upon the croſs examination of the broker who negotiated the policy, that *in his opinion*, theſe letters ought to have been produced, or the contents diſcloſed; and, that if they had, the policy would not have been underwritten. The defendant's counſel contended at the trial, as they have done upon this motion, that the policy was void: 1ſt, Becauſe the ſtate and condition of the fort, mentioned in the governor's letter to the *Eaſt India* Company, was not diſcloſed. 2dly, Becauſe he did

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not diſcloſe, that the *French*, not being in a condition to relieve their friends upon the coaſt, were more likely to make an attack upon this ſettlement, rather than remain idle: 3dly, That he had not diſcloſed his having received a letter of the 4th of * *February*, 1759; from which it ſeemed that the *French* had a deſign to take this ſettlement, by ſurprize, the year before. They alſo contended, that the opinion of the broker was almoſt deciſive: the whole was laid before the jury, who found for the plaintiff.

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Thirdly, It remains to conſider theſe objections; and to examine whether this verdict is well founded. To this purpoſe, it is neceſſary to conſider the nature of the contract, at the time it was made. The policy was ſigned in *May*, 1760. The contingency was, whether *Fort Marlborough* was or would be taken, by a *European* enemy, between *October* 1759, and *October* 1760. The computation of the riſk depended upon the chance, whether any *European* power would attack the place by ſea. If they did, it was incapable of reſiſtance. The underwriter at *London*, in *May* 1760, could judge much better of the probability of the contingency, than governor *Carter* could at *Fort Marlborough* in *September* 1759. He knew the ſucceſs of the operations of the war in *Europe*: he knew what naval force the *Engliſh* and *French* had ſent to the *Eaſt Indies*. He knew, from a compariſon of that force, whether the ſea was open to any ſuch attempt by the *French*. He knew, or might know every thing which was known at *Fort Marlborough* in *September* 1759, of the general ſtate of affairs in the *Eaſt Indies*, or the particular condition of *Fort Marlborough*, by the ſhip, which brought the orders for the inſurance. He knew that ſhip muſt have brought many letters to the *Eaſt India* Company: and, particularly from the governor. He knew what probability there was of the *Dutch* committing, or having committed hoſtilities. Under theſe circumſtances, and with this knowledge he inſures againſt the general contingency of the place being attacked by any *European* power. If there had been any deſign on foot, or enterprize begun, in *September* 1759, to the knowledge of the governor, it would have varied the riſk underſtood by the underwriter; on account of his not being told of a particular deſign or attack *then ſubſiſting*; and he eſtimated the riſk upon the foot of an uncertain operation, which might or might not be attempted. But the governor had no notice of any deſign ſubſiſting in *September* 1759. There was no ſuch deſign in fact: the attempt was made without premeditation, from the ſudden opportunity of a favourable occaſion, by the connivance and aſſiſtance of the *Dutch*, which tempted *Comte D' Eſtaigne* to break his parole. Theſe being the circumſtances, under which the contract was entered into, we ſhall be better able to judge of the

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objections

objections upon the foot of concealments. The firſt concealment is, that he did not diſcloſe the condition of the place. The underwriter knew the inſurance was for the governor. He knew the governor muſt be acquainted with the ſtate of the place. He knew the governor could not diſcloſe it, conſiſtently with his duty. He knew the governor, by inſuring, apprehended, at leaſt, the poſſibility of an attack. With this knowledge, without aſking a queſtion, he underwrote. By ſo doing, he took the knowledge of the ſtate of the place upon himſelf. It was a matter, as to which he might be informed various ways: it was not a matter, within the private knowledge of the governor only. But not to rely upon that, the utmoſt, which can be contended is, that the underwriter truſted to the fort being in the condition, in which it ought to be: in like manner, as it is taken for granted, that a ſhip inſured is ſea worthy. What is that condition? All the witneſſes agree, that it was only to reſiſt the natives, and not an *European* force. The policy inſures againſt a total loſs, taking for granted, that if the place was attacked, it would be loſt. The contingency, therefore, which the underwriter has inſured againſt is, whether the place would be attacked by an *European* force; and not whether it would be able to reſiſt ſuch an attack, if the ſhips could get up the river. It was particularly left to the jury to conſider, whether this was the contingency in the contemplation of the parties: they have found that it was. And we are all of opinion, that, in this reſpect, their concluſion is agreeable to the evidence. The ſtate and condition of the place were material in this view only, in caſe of a land attack by the natives. CHAP. X.

The ſecond concealment is, his not having diſcloſed, that, from the *French* not being able to relieve their friends upon the coaſt, they might make them a viſit. This is no part of the fact of the caſe: it is mere ſpeculation of the governor, from the general ſtate of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror, in his own dominions. The * practicability of it, in this caſe, depended upon the *Engliſh* naval forces in thoſe ſeas, of which the underwriter could better judge at *London* in *May* 1760, than the governor could at *Fort Marlborough* in *September*, 1759. The third concealment is, that he did not diſcloſe the letter from Mr. *Winch* of the 4th of *February*, 1759, mentioning the deſign of the *French* the year before. What that letter was; how he mentioned the deſign; or upon what authority he mentioned it; or by whom the deſign was ſuppoſed to be imagined, does not appear. The defendant has had every opportunity of diſcovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpoſe. The plaintiff offered

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to read the account *Winch* wrote to the *Eaſt India* Company, which was objected to; and therefore, it was not read. The nature of that intelligence therefore, is very doubtful. But taking it in the ſtrongeſt light, it is a report of a deſign to ſurprize the year before; but then dropt. This is a topic of mere general ſpeculation, which made no part of the fact of the caſe, upon which the inſurance was to be made. It was ſaid, if a man inſured a ſhip, knowing that two privateers were lying in her way, without mentioning that circumſtance, it would be a fraud. I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumſtance: becauſe it does not follow that they will cruiſe this year, at the ſame time, in the ſame place; or that they are in a condition to do it. If the circumſtance of this *deſign laid aſide* had been mentioned, it would have tended rather to leſſen the riſk, than encreaſe it. for the deſign of a ſurprize, which has tranſpired, and been laid aſide, is leſs likely to be taken up again; eſpecially by a vanquiſhed enemy. The jury conſidered the nature of the governor's ſilence as to theſe particulars; they thought it innocent, and that the omiſſion to mention them, did not vary the contract. And we are all of opinion, that, in this reſpect, they judged extremely right. There is a ſilence, not objected to at the trial, nor upon this motion; which might, with as much reaſon, have been objected to, as the two laſt omiſſions; rather more. It appears by the governor's letter to the plaintiff, that he was principally apprehenſive of a *Dutch* war. He certainly had, what he thought, good grounds for this apprehenſion. *Comte D' Eſtaigne* being piloted by the *Dutch*, delivering the
*P. 192 * fort to the *Dutch*, and ſending the priſoners to *Batavia*, is a confirmation of thoſe grounds. Probably, the loſs of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots: and it is plain, the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*. The reaſon why the counſel have not objected to his not diſcloſing the grounds of this apprehenſion is, becauſe it muſt have ariſen from political ſpeculation, and general intelligence: therefore, they agree, it is not neceſſary to communicate ſuch things to an underwriter.

Laſtly, Great ſtreſs was laid upon the opinion of the Broker. But we all think, the jury ought not to pay the leaſt regard to it: it is mere opinion; which is not evidence: it is opinion after an event: it is opinion without the leaſt foundation from any previous precedent or uſage: it an opinion, which, if rightly formed, could only be drawn from the ſame premiſſes, from which the court and jury were to determine the cauſe: and therefore, it is improper and irrelevant in the mouth of a witneſs.

witneſs. There is no imputation upon the governor, as to any intention of fraud. By the ſame conveyance, which brought his orders to inſure, he wrote to the company every thing, which he knew or ſuſpected: he deſired nothing to be kept a ſecret, which he wrote either to them or his brother. His ſubſequent conduct, down to the 8th of *February* 1760, ſhewed that he thought the danger very improbable. The reaſon of the rule againſt concealments is, to prevent fraud and encourage good faith. If the defendant's objections were to prevail, in the preſent inſtance, the rule would be turned into an inſtrument of fraud. The underwriter here, knowing the governor to be acquainted with the ſtate of the place; knowing that he apprehended danger, and muſt have ſome ground for his apprehenſion; being told nothing of either, ſigned this policy, without aſking a queſtion. If the objection, "that he was not told" is ſufficient to vacate it, he took the premium, knowing the policy to be void, in order to gain if the alternative turned out one way; and to make no ſatisfaction, if it turned out the other: he drew the governor into a falſe confidence, that if the worſt ſhould happen, he had provided againſt total ruin; knowing, at the ſame time, that the indemnity, to which the governor truſted, was void. There was not a word P. 193 ſaid to him of the affairs of *India*, or the ſtate of the war there, or the condition of *Fort Marlborough*. If he thought that omiſſion an objection, at the time, he ought not to have ſigned the policy with a ſecret reſerve in his own mind to make it void: if he diſpenſed with the information, and did not think this ſilence an objection then; he cannot take it up now, after the event. What has been often ſaid of the ſtatute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud: "that it ſhould never be ſo turned, conſtrued, or uſed, as to "protect, or be a means of fraud." After the fulleſt deliberation, we are all clear that the verdict is well founded; and that there ought not to be a new trial: conſequently, that the rule obtained for that purpoſe ought to be diſcharged.

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To have given this very elaborate and learned argument in the ſtate in which it was delivered, certainly requires no apology; becauſe from it may be collected all the general principles, upon which the doctrine of concealments, in matters of inſurance, is founded, as well as all the exceptions, which can be made to the generality of thoſe principles. To have abridged ſuch an argument, would have very much leſſened the pleaſure of the reader, and would have been an injury to the venerable judge, who in that form delivered the opinion of the court. The rules, then advanced and illuſtrated, have ſince been confirmed by the opinion of the judges upon ſimilar queſtions.

The

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Planche and Another v. Fletcher Doug 238.

The plaintiffs, *Planche* and *Jaquery*, merchants in *London*, insured goods "on board the *Swediſh* ſhip called the *Mary* "*Magdalena*, loſt or not loſt, at and from *London* and *Ramſ-* "*gate* to *Nantz*, with liberty to call at *Oſtend* being a general "ſhip in the port of *London* for *Nantz*." There was a declaration in the policy, that the inſurance was made on account of "certain perſons carrying on trade under the name and firm "of *Vallee* and *Dupleſſis*, Monſieur *Laſſau le Jeune*, *Guillaume* "*Albert*, *et Poitier de la Gueule*." The defendant underwrote the policy for 300*l.* at three Guineas *per cent.* The ſhip's clearances from the cuſtom houſe in *London* and her other papers, were all made out for *Oſtend* only, but the ſhip and goods were intended to go directly from *London* to *Nantz*, without
* P. 194 * going to *Oſtend*. Bills of lading in the *French* language, dated the 18th of *July* 1778, were ſigned by the captain in *London*, but purporting to be made at *Oſtend*, and that the goods were ſhipped there to be delivered at *Nantz*. The policy was ſubſcribed by the defendant on the 7th of *July*, and the lading was taken in between the 24th of *July* and the 17th of *Auguſt*. The proclamation for making repriſals on *French* ſhips, bore date the 29th, and appeared in the Gazettee on the 31ſt of *July*. Two underwriters had ſigned the policy after the proclamation, at the ſame premium of three guineas; one on the 31ſt of *July*, and the other on the 7th of *Auguſt*. The ſhip ſailed on the 24th of *Auguſt*, and was taken by a king's cutter, on her way to *Nantz*. After her departure from *Graveſend*, the captain threw overboard all the papers which he had received from the Cuſtom-houſe at *London* They had been obliterated by the Cuſtom-houſe officers at *Graveſend*, and were no longer of any uſe. The ſhip was releaſed by the Admirality, but the goods were condemned. The plaintiffs had no connection or ſhare in the ſhip. Such were the material facts in this caſe as they were ſtated this day by Lord *Mansfield* in his report, upon a rule to ſhew cauſe why there ſhould not be a new trial.

Sittings after Trin. 1779.

The cauſe had been tried at the laſt ſittings at *Guildhall*, and a verdict found for the plaintiff. The grounds for the application for a new trial were two. 1ſt, That there was a fraud on the underwriters, the ſhip having been cleared out for *Oſtend*, and yet never having been deſigned for that place. 2dly, That as hoſtilities were declared after the policy was ſigned, and before the ſhip ſailed, the defendant ought to have had notice, that he might have exerciſed his diſcretion, whether he would chuſe for a peace premium to run the riſk of capture. Beſide the facts above mentioned, his lordſhip ſtated, that the plaintiff had produced evidence to ſhew, that all ſhips, going with goods of *Britiſh* manufacture to *France*, clear out for *Oſtend*, without meaning to go thither; and that this is univerſally underſtood by perſons concerned in that branch of commerce

merce. The reaſons ſuggeſted for clearing out for *Oſtend*, and afterwards making bills of lading as from that place, were, that the light houſe duties are ſaved, which are payable when the voyage is known to be directly down the channel; and that the *French* duties are leſs upon goods from *Oſtend*, than from *England*.

* Lord *Mansfield*.—This verdict is impeached upon two grounds. 1ſt. It is ſaid there was a fraud on the underwriters, in clearing out the ſhip for *Oſtend*, when ſhe was never intended to go thither. But I think there was no fraud on them: perhaps, not on any body. What had been practiſed in this caſe was proved to be the conſtant courſe of the trade; and notoriouſly ſo to every body. The reaſon for clearing for *Oſtend*, and ſigning bills of lading as from thence, did not fully appear. But it was gueſſed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the ſame on ours; and it may be the intereſt of the farmers to connive at the importation of *Engliſh* commodities, and take *Oſtend* duties, rather than ſtop the trade, by exacting a tax, which amounts to a prohibition. But, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evaſion of the light-houſe duties, the ſhip was not liable to confiſcation on that account. 2d. The ſecond objection is, that the policy was made before, and the ſhip ſailed after, the proclamation for repriſals. But every man in *England* and *France*, on the 17th of *July*, expected the immediate commencement of a war. I will not ſay it was actually commenced; but the embaſſadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets were at ſea; and, as it appeared afterwards, were waiting for each other to fight. It does not appear that the goods were *French* property; an *Engliſhman* might be ſending his goods to *France* in a neutral ſhip. But it is indifferent whether they were *Engliſh* or *French*. The riſk inſured extends to all captures, and as two other underwriters ſigned at the ſame premium, after the proclamation, it appears that the war riſk was in view when the defendant ſigned. Shall he avail himſelf of an event, which encreaſes the riſk, but which he had in contemplation when he underwrote the policy? I am of opinion, that there ſhould not be a new trial. The three other judges concurred and the rule was diſcharged. * P. 195

A ſimilar deciſion was made in the following caſe. It was an action on a policy of inſurance on a *Portugueze* ſhip, at and from *Madeira* to her port of diſcharge in *Jamaica*, with liberty to touch at the *Leeward Iſlands*. The defendant underwrote * 150*l.* upon it: the ſhip was captured by a *French* privateer, and condemned in the court of Admiralty in *France*, on the ground of Mayne v. Walter. B. R. Eaſt. 22 Geo. 3. * P. 196

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of having an *Engliſh ſupercargo* on board. The action was brought to recover this loſs from the underwriter, who refuſed to pay, alledging, that the plaintiff ſhould have diſcloſed to him, that the ſupercargo was *Engliſh*. At the trial, a verdict was given for the plaintiff, upon a caſe reſerved for the opinion of the court, and containing in ſubſtance the facts juſt ſtated.

For the defendant it was inſiſted, upon the argument, that the agent for the inſured ought to have diſcloſed this fact; and that it was the more material in this caſe, becauſe during the preſent war, an ordinance paſſed in *France*, ſimilar to one made in the laſt war in 1756, which declares, that no *Dutch* ſhip ſhall be allowed to take on board a ſupercargo, belonging to any nation at enmity with the court of *France*: and that if any ſhip, having ſuch ſupercargo, be taken, it ſhall be condemned as lawful prize.

Lord *Mansfield*.—It is an oppreſſive and arbitrary rule, and contrary to the law of nations. If both parties were ignorant of it, the underwriter muſt run all riſks: and if the defendant knew of ſuch an edict, it was his duty to enquire, if ſuch a ſupercargo were on board. It muſt be a fraudulent concealment of circumſtances, that will vitiate a policy. But it is remarkable, that neither party has ſaid a word, reſpecting the treaties between *France* and *Portugal*. Judgment was accordingly given for the plaintiff.

3d. We come now to the third great diviſion of this chapter, namely, to caſes in which policies are void by miſrepreſentation. Before we proceed to ſtate the caſes under this head, it will be proper to diſtinguiſh between a warranty and a repreſentation. A warranty or condition is that, which makes a part of the written policy, and muſt be literally and ſtrictly performed; and being a part of the agreement, nothing *tantamount* will do, or anſwer the purpoſe. A repreſentation is a ſtate of the caſe, not a part of the written inſtrument, but collateral to it, and entirely independent of it; and it is ſufficient, that a repreſentation be ſubſtantially performed.

Vide poſt c. 15. The conſequence of a breach of a warranty we ſhall take notice hereafter. If there be a miſrepreſentation, it will avoid the policy, as a fraud, but not as a part of the agreement. Even written inſtructions, if they are not inſerted in the policy, are only to be conſidered as repreſentations; and in order to make them valid and binding as a warranty, it is abſolutely neceſſary to make them a part of the inſtrument, by which the contract of indemnity is effected. If a repreſentation be falſe in any material point, it will avoid the policy; and if the point be not material, the repreſentation can hardly ever be fraudulent. The principle upon which the policy is void in ſuch a caſe, we ſtated in the opening; that the underwriter has computed the riſk upon circumſtances, which were falſe, or which

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which did not exiſt. Theſe doctrines are fully eſtabliſhed by a variety of judicial deciſions,

Upon a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* reported as follows. This was an action upon a policy of inſurance. At the trial it appeared in evidence, that the firſt underwriter had the following inſtructions ſhewn to him: "Three thouſand five hundred "pounds upon the ſhip *Julius Cæſar*, for *Halifax*, to touch at "*Plymouth*, and any port in *America*; *ſhe mounts twelve guns* "*and twenty men.*" Theſe inſtructions were not aſked for, nor communicated to the defendant; but the ſhip was only repreſented *generally to him as a ſhip of force:* and a thouſand pounds had been done, before the defendant underwrote any thing upon her. The inſtructions were dated the 28th of *June*, 1776, and the ſhip ſailed on the 23d of *July*, 1776; and was taken by an *American* privateer. That at the time of her being taken, ſhe had on board 6 *four pounders*, 4 *three pounders*, 3 *one pounders*, 6 *half pounders*, which are called *ſwivels*, and 27 men and boys in all, for her crew; but of *them*, 16 only were *men*, (not 20, as the inſtructions mentioned) and the reſt, boys. But the witneſs ſaid, he conſidered her as being ſtronger with this force, than if ſhe had 12 carriage guns and 20 men: he alſo ſaid (which is a material circumſtance) that *there were neither men nor guns on board, at the time of the inſurance.* That he himſelf inſured at the ſame premium, without regard or enquiry into the force of the ſhip. Other underwriters alſo inſured at the ſame premium, without any other repreſentation than that ſhe was *a ſhip of force.* That * to every four pounder, there ſhould be five men and a boy. That in merchant ſhips, boys always go under the denomination of men. This was met by evidence on the part of the defendant, ſaying, that guns mean *carriage* guns, not *ſwivels*; and men mean *able men*, excluſive of *boys*. There were three cauſes of the ſame nature depending upon the ſame evidence. The defence in each was, that theſe inſtructions were to be conſidered as a warranty, the ſame as if they had been inſerted in the policy; though they were not proved to have been ſhewn to any but the firſt underwriter. In all the three caſes, the queſtion for the court to determine, is, whether the inſtructions, which were ſhewn to the firſt underwriter, are to be conſidered as a warranty inſerted in the policy; or as a repreſentation, which would avoid the policy, if fraudulent. If the court ſhould of opinion, that the inſtructions amounted to a warranty, then a new trial is to be had in each without coſts; otherwiſe, the verdicts, which were all for the plaintiffs, are to ſtand. At the trial I was of opinion, that it would be of very dangerous conſequence, to add a converſation, that paſſed at that time, as part of the written agreement. It is a collateral

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collateral repreſentation; and if the parties had conſidered it as a warranty, they would have had it inſerted in the policy. But ſecondly, if theſe inſtructions were to be conſidered in the light of a fraudulent miſrepreſentation; they muſt be both material and fraudulent: and in that light, I held, that a miſrepreſentation made to the firſt underwriter ought to be conſidered as a miſrepreſentation made to every one of them, and ſo would infect the whole policy. Otherwiſe, it would be a contrivance to deceive many: for where a good man ſtands firſt, the reſt underwrite without aſking a queſtion: and if he be impoſed upon, the reſt of the underwriters are taken in by the ſame fraud. The caſe was left to the jury under that direction.

After argument at the bar, Lord *Mansfield* aſked, Whether there was any caſe that made a difference between a written and a parol repreſentation? No anſwer being given, his lordſhip proceeded: there is no diſtinction better known to thoſe, who are at all converſant in the law of inſurance, than that which exiſts between a *warranty* or condition, * which makes part of a written policy, and a repreſentation of the ſtate of the caſe. Where it is a part of the written policy, it muſt be performed. As if there be a warranty of convoy, there it muſt be a *convoy*; nothing elſe will anſwer the idea intended by the warranty: it muſt be ſtrictly performed, as being a part of the agreement; for in the caſe of convoy it might be ſaid, the party would not have inſured without convoy. But as, by the law of merchants, all dealings muſt be fair and honeſt, fraud infects and vitiates every mercantile contract. Therefore, if there be fraud in a repreſentation, it will avoid the policy, on account of the fraud, but not on account of the non-compliance with any part of the agreement. If in a life policy, a man warrant another to be in good health, when he knows, at the ſame time, he is ill of a fever, *that* will not avoid the policy on the ground of miſrepreſentation; (tho' it will be void for non-compliance with the warranty); becauſe by the warranty, the inſured takes the riſk upon himſelf. But if there be no warranty, and he ſay, "the man is "in good health," when in fact he knows him to be ill, it is *falſe*. So it is, if he do not know, whether he be well or ill; for it is equally falſe to undertake to ſay that, which he knows nothing at all of, as to ſay, *that* is true, which he knows is not true. But if he only ſay, "he believes the man to be in good "health," knowing nothing about it, nor having any reaſon to believe the contrary; there, though the perſon is not in good health, it will not avoid the policy, becauſe the underwriter *then* takes the riſk upon himſelf. So that there cannot be a clearer diſtinction, than that which exiſts between a warranty, which makes part of the written policy, and a collateral

* P. 199

teral repreſentation, which, if falſe in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the uſage being to conſider inſtructions as a part of the policy, that parol inſtructions were never entered in a book, nor written inſtructions kept, till a few years ago, upon occaſion of ſeveral actions brought by the inſured upon policies, where the brokers had repreſented many things they ought not to have repreſented, in conſequence of which the plaintiffs were caſt. I adviſed the inſured to bring an action againſt the brokers, which they did, and recovered in ſeveral inſtances: and I have repeatedly at *Guildhall*, cautioned * and recommended it to the brokers, to enter all repreſentations made by them in a book. That advice has been followed in *London*; but it appeared lately, at the trial of a cauſe, that at *Briſtol*, to this hour, they make no entry in their books, or keep any inſtructions. The queſtion then is, whether in this policy, the perſon inſuring has warranted that the ſhip ſhould poſitively and literally have 12 *carriage guns, and* 20 *men.* That is, whether the inſtructions given in evidence are a part of the policy. Now I will take it by degrees. The two firſt underwriters before the court are *Watſon* and *Snell.* Says *Watſon*, "it is "part of my agreement, that the ſhip ſhall ſail with 12 guns, "and 20 men; and it is ſo ſtipulated, that nothing under that "number will do: ten guns with ſwivels will not do." The anſwer to this is, read your agreement; read your policy. There is no ſuch thing to be found there. It is replied, yes, but in fact there is, for the inſtructions, upon which the policy was made, contain that expreſs ſtipulation. The anſwer again is, there never were any inſtructions ſhewn to *Watſon*; nor were any aſked for by him. What colour then has he to ſay that thoſe inſtructions are any part of his agreement? It is ſaid, he inſured upon the credit of the firſt underwriter. A repreſentation to the firſt underwriter has nothing to do with that, which is the agreement, or terms of the policy. No man who underwrites a policy, ſubſcribes by the act of underwriting, to terms of which he knows nothing: but he reads the agreement, and is governed by that. Matters of intelligence, ſuch as that a ſhip is or is not miſſing, are things in which a man is guided by the name of a firſt underwriter, who is a good man, and to which another will therefore give faith and credit: but not to a collateral agreement, of which he can know nothing. The abſurdity is too glaring, it cannot be. By extenſion of an equitable relief in caſes of fraud, if a man is a knave with reſpect to a firſt underwriter, and makes a falſe repreſentation to him in a point that is material; as where having notice of a ſhip being loſt, he ſays ſhe was ſafe; that ſhall affect the policy with regard to all the ſubſequent underwriters, who are preſumed to follow the firſt. How then do *Watſon*

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and

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and *Snell* underwrite the ſhip in queſtion? Without knowing whether ſhe had any force at all. *That* proves the riſk was equal to a ſhip of no force at all; and the premium was a vaſt
* P. 201 * one; eight guineas. So much therefore for thoſe two caſes. The third caſe is that of *Ewer*, who ſaw the inſtructions, with the repreſentation, which they contained. Did the number of guns induce him to underwrite the policy? If it did, he would have ſaid, put them into the policy; warrant that the ſhip ſhall depart with 12 guns, and 20 men. Whereas he does no ſuch thing, but takes the ſame premium, which *Watſon* and *Snell* did, who had *no* notice of her having any force. What does that prove? That he is paid and receives a premium, as if it were a ſhip of no force at all. The repreſentation amounts to no more than this, I tell you what the force will be, becauſe it is ſo much the better for you. There is no fraud in it, becauſe it a repreſentation only of what, in the then ſtate of the ſhip, they thought would be the truth. And in real truth, the ſhip ſailed with a larger force for ſhe had nine carriage guns and ſix ſwivels. The underwriters therefore had the advantage by the difference. There was no ſtipulation about what the weight of metal would be. All the witneſſes ſay, that ſhe had more force than if ſhe had 12 carriage guns, in point of ſtrength, of convenience, and for the purpoſe of reſiſtance. The ſupercargo in particular ſays, "he "inſured the ſame ſhip and the ſame voyage, for the ſame "premium, without ſaying a ſyllable about the force." Why then it was a matter proper for the jury to ſay, whether the repreſentation was falſe, or whether it was in fact an inſurance as of a ſhip without force. They have determined, and I think very rightly, that it was an inſurance without force. *Ewer* makes an objection, that the repreſentation ought to be conſidered as inſerted in the policy; but the anſwer to that is, he has determined whether it ſhould be inſerted in the policy or not, by not inſerting it himſelf. There is a great difference, whether it ſhall be conſidered as a fraud. But it would be very dangerous to permit all collateral repreſentations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr *Thornton* has paid, who was the firſt perſon that ſaw the inſtructions. Shall the reſt refuſe then? As to *Watſon* and *Snell*, they have no pretence to refuſe; for there is not a colour for the objection made by them. As to *Ewer*, we are all ſatisfied with the determination
* P. 202 * of the jury againſt him. Therefore the rule for a new trial muſt be diſcharged.

N. B. On the *Monday* following, Mr. *Davenport* ſaid, he was deſired by the underwriters to aſk, whether it was the opinion of the court, that to make written inſtructions valid and binding as a warranty, they muſt be inſerted in the policy.

Lord

Lord *Mansfield* anſwered, that moſt undoubtedly that was the opinion of the court: If a man warrant that a ſhip ſhall depart with 12 guns, and it depart with 10 only, it is contrary to the condition of the policy.

From the judgment pronounced in the cauſe juſt ſtated, we learn the difference between a warranty, and a repreſentation: we learn alſo, that a performance in ſubſtance will ſatisfy a condition expreſſed in a repreſentation; but that nothing except a ſtrict and literal compliance will fulfil the terms of the former: and we alſo are inſtructed in the whole doctrine of repreſentation, as far as it affects the contract of inſurance. The poſitions advanced in the above caſe were ſo ſatisfactory, that they have been adopted, as the ground of direction to juries, upon all queſtions of repreſentation; and have been followed by the court, whenever points of that nature have come before them for judgment.

Bize v. Fletcher. Sittings after Eaſter Term 1779, at Guildhall. Doug. Rep. 271.

This was an action on a policy of inſurance on the ſhip *Carnatic Eaſt Indiaman*, "at and from *Port L'Orient*, to the iſles "of *France* and *Bourbon*, and to all or any ports or places "where, and whatſoever, in the *Eaſt Indies*, *China*, *Perſia*, or "elſewhere, beyond the *Cape of Good Hope*, from place to "place; and during the ſhip's ſtay and trade, backwards and "forwards, at all ports and places, and until her ſafe arrival "back at her laſt port of diſcharge in *France*." But at the ſame time that this policy was ſubſcribed, there was a ſlip of paper wafered to it, and ſhewn to the underwriters, on which was written the following repreſentation: "The ſhip has had "a complete repair, and is now a fine and good veſſel, three "decks. Intends to ſail in *September* or *October* next (1776), "Is to go to *Madeira*, the iſles of *France*, *Pondicherry*, *China*, "the iſles of *France*, and *L'Orient*."

* The ſhip did not ſail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *Auguſt* following, when, inſtead of proceeding to *China*, ſhe ſailed for *Bengal*, where having paſſed the winter and undergone conſiderable repairs, ſhe ſailed from thence early in the year 1778, (being the ſecond ſhip that left the *Ganges*) returned to *Pondicherry*; and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year, by the *Mentor* privateer. The uſual time, in which the direct voyage between *Pondicherry* and *Bengal* is performed, is ſix or ſeven days; but the *Carnatic* was about ſix weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, ſhe either touched at, or lay off *Madras*, *Maſulipatam*, *Viſigapatam* and *Yanon*, and took in goods at all thoſe places.

* P. 203

CHAP. X. It was contended in this cauſe at the trial, that the repreſentation accompanying the policy reſtrained the voyage to the limits therein ſpecified. They produced ſome letters from the owners to their correſpondents, one of which was to the following effect: "We doubt not, but on account of the ſtorm, "the ſhip will be forced to go to *Bengal* to be laid down, which "cannot be done at *Pondicherry*; in which caſe, our captain "will have entered a proteſt, which we will forward in time "to you." In a ſubſequent letter, they ſay nothing of the ſtorm or leak; but mention a different cauſe for the ſhip's going to *Bengal*. Theſe letters, it was ſaid, raiſed a preſumption, that the neceſſity of going to *Bengal* was merely a pretence deviſed after the capture, and when the inſured began to apprehend that the words of the policy would not cover a voyage o that place.

Lord *Mansfield* told the jury, that the firſt queſtion was, whether the policy was void, on account of miſrepreſentation. Now there is an eſſential difference between a warranty, and a repreſentation. The warranty is a part of the contract: a riſk deſcribed in the policy is part of the contract. There can be no warranty by any collateral repreſentation. The ground, on which a repreſentation affects a policy, is fraud. The repreſentation muſt be fraudulent, that is, it muſt be falſe and
* P. 204 * material in reſpect to the riſk to be run. All riſks are governed by the nature of them; and the premium is governed by the riſk. Where a repreſentation accompanies an inſtrument, it ſays, "I will have this underſtood as my preſent intention; "but I will have it in my power to vary it." The great queſtion in this cauſe is, whether the repreſentation was falſe, and that in a material inſtance. Fraud is found out by the materiality of the point it is charged in. It is to be conſidered then, whether they had really a view of going to *China*. A witneſs has proved that the difference of inſurance is one *per cent.* on going to *Bengal*, and not to *China*. If you think that this was a miſrepreſentation to avoid paying the one *per cent.* you will find for the defendant. But if you are ſatisfied that the real intention, at the time of the repreſentation, was to go to *China*, the plaintiff will be entitled to your verdict: for the inſured may change his intention, go to *Bengal*. and yet be protected by the policy, which clearly admits of that voyage, and muſt be underſtood by both parties in a greater latitude than the repreſentation, being expreſſed in different and much more comprehenſive terms. If, upon the whole evidence, you ſhall be of opinion, that no fraud was intended, and that the variance between the intended voyage, as deſcribed in the ſlip of paper, and the actual voyage as performed, did not tend to increaſe the riſk to the underwriters, *this ſlip of paper being only a repreſentation*, you muſt find for the plaintiff. The jury found

found a verdict accordingly. And although in ſeveral cauſes upon the ſame ſhip, new trials were moved for, and granted; yet in this, which was the only cauſe, in which there was a repreſentation, the verdict was acquieſced in, and no motion reſpecting it ever was made. CHAP. X

Vide Doug Rep. 271

In the outſet of this chapter, we took notice of a very material rule reſpecting miſrepreſentation; and which it now becomes neceſſary to repeat. If a repreſentation be made to the underwriter of any circumſtance, which was falſe, this, if it be in a material point, ſhall vacate the policy, and annul the contract, although it happen by miſtake, and without any fraudulent intention, or improper motive on the part of the inſured. We alſo ſtated the principle, on which, in ſuch a caſe, the contract is held to be void: becauſe the inſurer is led into *error, and computes his riſk upon circumſtances not founded in fact; by which means, the riſk actually run is different from that intended to be run, at the time the contract is made. On this ground it is, that the contract is as much at an end, as if there had been a wilful and falſe allegation, or an undue concealment of circumſtances. The doctrine here meant to be advanced will be better underſtood, and more fully illuſtrated, by attention to the following caſe.

5 Burr. 1909

* P. 205

It was an action on a policy of inſurance on the ſhip, "the *Mary* and *Hannah*, from *New York* to *Philadelphia*." At the time when the inſurance was made, which was in *London*, on the 30th of *January*, the broker repreſented the ſituation of the ſhip to the underwriters as follows: "The *Mary* and *Han-* "*nah*, a tight veſſel, ſailed with ſeveral armed ſhips, and was "ſeen ſafe in the *Delaware on the* 11*th of December*, by a ſhip "which arrived at *New York*." In fact the ſhip was loſt on *the* 9*th of December*, by running againſt a *cheveau de friſe*, placed acroſs the river. The cauſe came on to be tried before Lord *Mansfield* at *Guildhall*. The defence was founded on the miſrepreſentation as to the time when the ſhip was ſeen: and the repreſentation and the day of the loſs being proved, the jury found for the defendant. A rule was obtained on the part of the plaintiff, calling upon the defendant to ſhew cauſe why there ſhould not be a new trial. After argument at the bar,

Macdowall v. Fraſer Doug. 247

Lord *Mansfield* ſaid: The diſtinction between a warranty and a repreſentation is perfectly well ſettled. A repreſentation muſt be fair and true. It ſhould be true as to all that the inſured knows; and, if he repreſents facts to the underwriter, without knowing the truth, he takes the riſk upon himſelf. But the difference between the fact as it turns out, and as repreſented, muſt be material. The caſe of the *Julius Cæſar* was very different from this. The ſhip there was only fitting out, when the inſurance was made. No guns nor men were put on board. It was only ſaid, what was meant to be done; and what was done, though

Vide ante the Caſe of Pawſon v. Watſon p. 197.

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though different, was as advantageous, or more ſo, than what had been repreſented. There was no evidence of *actual fraud* in the preſent caſe, and no queſtion of that ſort ſeemed to be made. But there was a poſitive averment, that the ſhip was ſeen in the *Delaware* on the 11th of *December*. The under-

* P. 206 * writer was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial *when* ſhe was ſeen in the *Delaware*, or in what condition: but ſuppoſe the fact had been explained in the manner now ſuggeſted, why did the inſured take upon him to compute the day of the month, on which ſhe had been ſeen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In inſurances on ſhips at a great diſtance, their being ſafe up to a certain day is always conſidered as a very important circumſtance. I am of opinion, that the repreſentation concerning the day was material.

Mr. Juſtice *Willes*.—This is certainly only a repreſentation; but, in an inſurance on ſo ſhort a voyage, it might have made a material difference whether the ſhip was known to be ſafe two days ſooner or later. It ought to have been ſhewn, on the part of the plaintiff, that it was not material, but there was no evidence that the ſhip was met on the 9th, or any other day. The materiality was proper for the conſideration of the jury.

Mr. Juſtice *Aſhhurſt*.—The diſtinction, which the court has made in the caſes on the *Julius Cæſar*, and ſome others, between a repreſentation, and a warranty, is extremely juſt. There is *no imputation of fraud* in this caſe; but the inſured ſhould have been more cautious. In the former caſes, the repreſentation was of what was intended; here it was of a fact ſtated as having happened, within the knowledge of the inſured. He ſhould have made the repreſentation in the ſame words, in which the intelligence is ſaid to have been communicated to him.

Mr. Juſtice *Buller*.—We cannot ſay the difference of the day was not material. The ſafety of the ſhip is the moſt material fact of any, in caſes of inſurance. The plaintiff admits that the place where ſhe was met in ſafety, was material. Why was not the time equally ſo? There was no *intentional deceit*, and it is perhaps unfortunate that the inſured made *the miſtake*; but I think the verdict right.

* P. 207 * The rule for a new trial was accordingly diſcharged.

Shirley v. Wilkinſon. B. R. Mich. 22 Geo. 3. Doug. Rep. 2d edit. 293.

A ſimilar deciſion was made by the ſame learned judges at a period ſubſequent to that of the caſe of *Macdowall* and *Fraſer*.

Upon a motion for a new trial, Lord *Mansfield*, and the reſt of the court, were clearly of opinion, that if the broker, at the time when the policy is effected, in repreſenting to the underwriter

writer the ſtate of the ſhip, and the laſt intelligence concerning her, does not diſcloſe the whole, and what he *conceals* ſhall appear *material* to the jury, they ought to find for the underwriter, the contract in ſuch caſe being void; although the concealment ſhould have been *innocent*, the facts not mentioned having appeared *immaterial* to the broker, and having not been communicated merely on that account.

But as has been ſaid before, and as will appear from the caſes already cited, in order to vitiate the contract, the thing concealed muſt be *material*, it muſt be *ſome fact*, and not merely a ſuppoſition or ſpeculation of the inſured; and the underwriter muſt take advantage of any miſrepreſentation the firſt opportunity, otherwiſe he will not be allowed to claim any benefit from it at a future period. If therefore the inſured merely repreſent that he *expects* a thing to be done, the contract will not be void, although the event ſhould turn out very different from his expectation.

Thus upon a motion for a new trial, one of the grounds ſtated to induce the court to grant it was, that ſince the trial, a material repreſentation, which had been made to *Shulbred*, the firſt underwriter upon the policy, and which turned out to be falſe, had been diſcovered. *Shulbred* made an affidavit, by which it appeared, that when he ſigned the policy in *March* 1778, the broker was getting ſeveral others, on other ſhips, ſubſcribed at the ſame time, all belonging to the ſame owner, and ſaid, ſpeaking of them all—"which veſſels are *expected* to "leave the coaſt of *Africa* in *November* or *December*, 1777." In truth, the veſſel in queſtion had ſailed in *May*, 1777, and *Shulbred* ſwore, that, if he had known that circumſtance, he would not have ſigned. There had been actions brought againſt all the underwriters on the policy, except *Shulbred*. Barber v. Fletcher. Doug. 292.

* Lord *Mansfield*.—It has certainly been determined in a variety of caſes, that a repreſentation to the firſt underwriter extends to the others. But under what circumſtances has the defendant gone to trial in this caſe? he certainly knew what had been repreſented to himſelf. He was acquainted with *Shulbred*, and had an opportunity of aſking before the trial what had been repreſented to *him*. If therefore this evidence is *new*, it is owing to his own negligence. But the repreſentation is not material; it was only an *expectation*, and the underwriters did not enquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict ſhould be for the plaintiff. The rule was diſcharged. * P. 208

There is another rule upon this ſubject, which it is material *particularly* to mention; although it may be collected from almoſt all the caſes that have already been quoted: and it is applicable to each of the three branches, into which this chapter

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has been divided. Wherever there has been an allegation of a falſhood, a concealment of circumſtances, or a miſrepreſentation, it is immaterial, whether ſuch allegation or concealment be the act of the perſon himſelf who is intereſted, or of his agent; for in either caſe, the contract is founded in deception, and the policy is conſequently void. The reaſon of this rule is nothing more than that, which the law of *England* has for general convenience adopted, in treating of the relation between maſter and ſervant; declaring, that the maſter muſt always be reſponſible for the act of his ſervant, if done by his *expreſs* or *implied* command. It would indeed be of very miſchievous conſequence, if a man might ſhelter himſelf from reſponſibility of any kind, by throwing the blame upon his agent: it would be to allow him to contradict a maxim of law, which ſays, that no man ſhall be ſuffered to make any advantage of his own wrong: and would overturn that wiſe principle of equity, that when one of two innocent perſons (for the maſter may without danger to the argument be ſuppoſed innocent) muſt ſuffer by the fraud or negligence of a third, he, who gave credit to that third perſon, ſhall bear the conſequences ariſing from the confidence ſo repoſed. If this be true, and it cannot be denied, of contracts in general, it muſt alſo be admitted in thoſe of inſurance, where from the very nature of * P. 209 * the caſe, the buſineſs is ſeldom tranſacted by the parties themſelves; but is moſt commonly effected by the interpoſition of agents or brokers. The courts of juſtice have accordingly held, that any fraud in the agent of the inſured vitiates and annuls the contract, as much as direct fraud in the inſured himſelf: and this, although the act cannot be traced at all to the owner of the property; or even though he ſhould be perfectly innocent.

Stewart and Others v. Dunlop and Others. H. of Lords det. Apr. 8. 1785.

In a caſe before the Houſe of Lords, ſo late as the year 1785, this doctrine was confirmed. It came before the Houſe on an appeal from the Court of Seſſions in *Scotland*, which had determined in favour of the reſpondents, the underwriters. The caſe was ſhortly this: a man having arrived at *Greenock*, knowing of the loſs of the ſhip inſured, and meeting a friend and intimate acquaintance of the inſured, and a partner with him in ſome other adventures, communicated the intelligence of the loſs of the ſhip to him, *who deſired it might be concealed.* The ſame day, as appeared by the evidence, the perſon, who had received this information, held a converſation with the plaintiff's clerk, who made this depoſition, "that neither at "that time, nor at any other time of the ſaid day, had he any "converſation whatever with the ſaid Mr. *Boog*, or meſſage "from him, either in writing or otherwiſe, relative to the "*Peggy* (the ſhip inſured) nor did he get *any hint* from him, "or any other perſon, relative to the making inſurance upon "her,

" her, further than the ſaid Mr. *Boog's aſking the deponent if he* " *knew whether there was any inſurance made upon her*, and if " there was any account of her." After this converſation, the plaintiff deſired the clerk to write to get an inſurance effected, which he did, without ſtating a word, (at leaſt it did not appear that he ſtated any) of this converſation to his maſter. Upon the whole of the evidence in this cauſe, although it did not appear by any depoſition that the plaintiff knew of the loſs of the ſhip, at the time he made the inſurance, the Lords of Seſſion decreed, " that the inſurance made by the plaintiff " would not have been made, if the brigantine *Henrietta* had " not arrived in the road of *Greenock* the day preceding, and " brought intelligence that the ſhip *Peggy* was taken; and " therefore that the policy was void." The Houſe of Lords confirmed this decree.

* In the deciſions of the Houſe of Lords, the reaſons of the judgment never appear; and even when the learned judges give their opinions upon any cauſe then depending in that houſe, authentic reports of them are not eaſily obtained: the conſequence of this is, that one is frequently left to conjecture, upon what grounds the decree was pronounced. If we may be allowed to conjecture upon the caſe of *Stewart* v. *Dunlop*; it ſhould ſeem, that as no direct or poſitive act of knowledge was brought home to the plaintiff himſelf, the converſation which the clerk had with Mr. *Boog*, was held to be a ſufficient proof, that the loſs was known to him, at the time he wrote the letter, at the deſire of the plaintiff, ordering the inſurance. If known to the clerk, the act of the agent in ſuch a caſe becomes the act of the principal; becauſe the law, upon general reaſons of policy, will preſume, that the principal muſt know whatever has come to the knowledge of the agent. * P. 210

But in the end of the ſame year, a caſe was decided in the King's Bench, expreſsly upon the point of fraud in the agent; for it appeared that the inſured was not guilty of any improper conduct in the tranſaction. In that caſe, the circumſtances were numerous; and the judges gave their opinions *ſeriatim* upon the queſtion.

It was an action on a policy of inſurance for 110*l.* underwritten by the defendant on the 21ſt of *September*, 1782, at ſix guineas *per cent.* on a cargo of oats on board the ſhip *Joſeph*, loſt or not loſt, at and from *Hartland* to *Portſmouth*, beginning the adventure from the loading thereof on board the ſaid ſhip at *Hartland*. The defendant pleaded the general iſſue, and paid the premium into court. This cauſe came on to be tried before Mr. Juſtice *Buller* at *Guildhall*, when a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following caſe: Fitzherbert v. Mather. 1 Term. Rep. p. 12.

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That on the 27th of *July*, 1782, *William Bundock*, of *Pool*, agent for the plaintiff, contracted with *Richard Thomas*, of *Hartland*, a corn factor, for the purchase of 500 quarters of oats, to be consigned to *William Fuller* at *Portsmouth*, on plaintiff's account; and desired *Thomas* to send him *(Bundock)*

* P. 211 * a bill of lading and invoice, and also a like bill of lading and invoice to the plaintiff at Mr. *Fisher's* at the *Tower*, *London*. That in pursuance thereof, *Thomas* shipped the oats on board the ship insured, which sailed from *Hartland on the 16th of September*, 1782, and was lost *the same day* off the pier of *Hartland*. That on *the 16th of September*, 1782, *Thomas* wrote the two following letters to *William Bundock*, and to *Fisher*.

To Mr. WILLIAM BUNDOCK.

Hartland, *Sept.* 16th, 1782.

Sir,

This morning I loaded the *Joseph* with 175 quarters of oats to the address of *William Fuller*, *Portsmouth*, *and the sloop sailed immediately*; but I am afraid the wind is coming to the westward, and will force her back. I have sent a bill of loading, and a letter by the master to Mr. *Fuller*; and also a bill of loading and advice to Mr. *Fisher*, that *he may insure*, if he likes, as the equinox is near, &c. R. THOMAS.

To CUTHBERT FISHER, Esq;

Hartland, *Sept.* 16th, 1782.

Sir,

By an order from Mr. *William Bundock* of *Pool*, I shipped this day on board the *Joseph*, which immediately set sail for *Portsmouth*, a cargo of oats as under; and by the same order, *as well as the order of Thomas Fitzherbert*, Esq. I took the liberty of drawing on you at three days sight, in favour of Messrs. *Scott* and *Wilkes*, or order, 106*l.* to be placed to the account of *Thomas Fitzherbert*, Esq. *I wish the whole safe to hand*, and expect another vessel to be loaded this week, weather permitting: this evening appears stormy. R. THOMAS.

Then follows the bill of lading. The case further states, that about *six* or *seven* o'clock of *the evening of the 16th of* September, Thomas *heard a report that the ship was on shore*; *and at six o'clock in the morning of the 17th, he knew the ship was lost*. That the mode of sending letters from *Hartland* to *London*, is as follows: the letters are collected by a private hand

* P. 212 * about one or two o'clock of the day, on which the post sets out from *Biddeford*, from which place it goes about nine o'clock in the evening. That the 16th of *September* was not a post day; *and the above letters did not leave* Hartland *till one o'clock*

in

in the afternoon of the 17*th*, which was the poſt day from *Biddeford* to *London:* and the letters which went from *Biddeford* by the poſt of that evening, were received in *London* on the 20th of *September*. That on the 19th, the plaintiff wrote the following letter to *Fiſher*.

Stubb-Lodge, Portſmouth, Sept. 19*th*, 1782.

Dear *Fiſher*,

My correſpondent, Mr. *Bundock*, having informed me, that he has ſent two ſloops to *Hartland* in *Devonſhire*, to load oats on my account and riſk, I beg the favour of you to inſure my amount of the cargoes to *Portſmouth*, as ſoon as the bills are ſent you. T. FITZHERBERT.

That the laſt mentioned letter, together with the former from *Thomas*, dated *September* 16th, were received by *Fiſher* in *London*, on the 20th of *September*; and he thereupon directed the inſurance in queſtion to be effected: that on the 21ſt, defendant ſubſcribed the policy. Upon this caſe, after argument at the bar,

Lord *Mansfield* ſaid: this policy is effected by miſrepreſentation, and that miſrepreſentation ariſes *from the proper agent* of the plaintiff, who gives the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either caſe, the policy is void. As to the miſrepreſentation, the underwriter was warranted on the information of the agent, to take for granted, that the ſhip was ſafe at 12 or 1 o'clock of the 17th of *September*; for the agent gives an account of the ſhip being loaded, and ſays, "I wiſh the whole "ſafe to hand." Then there was ſtrong ground to believe on his letter, that ſhe was ſafe when the poſt came away; and the poſt mark ſhews the day when the letters were ſent. How does this miſrepreſentation come? Why from *Thomas*, who writes to *Fiſher*, and gives him notice of the ſhip's ſailing, on purpoſe that he may inſure; for ſo he ſays expreſsly in his letter to *Bundock*. He was honeſt at the time he wrote the letter; * but on the 16th, at night, he hears that the ſhip is gone aſhore, and the next morning he knew that ſhe was abſolutely loſt. The poſt did not go out till the afternoon of that day; and he had full opportunity to ſend an account of the loſs. If *Thomas* were not guilty of fraud, at leaſt he was guilty of groſs negligence: but either way, if *Thomas* were perfectly innocent, this policy, being effected by miſrepreſentation, is void.

* P. 213

Mr. Juſtice *Willes*.—*Thomas* is moſt clearly to be conſidered as the agent of the plaintiff. He ſhews by his letter to *Fiſher*, that he acts as well by the orders of *Fitzherbert* as of *Bundock*. If then *Thomas* be the agent of the plaintiff, he is moſt certainly

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tainly liable for his misrepresentations: and in this case the misrepresentation is gross.

Mr. Justice *Ashhurst*.—On principles of policy, it is necessary that a man should be answerable for the acts of his agent. It is often difficult to prove the privity of knowledge; and therefore the law will presume, that facts known to the one, are also within the knowledge of the other. Nor is there any hardship on the plaintiff; for if this fact had been known, the policy could not have been effected.

Mr. Justice *Buller*.—In order to shew, that *Thomas* was not the agent of the plaintiff, the counsel has assumed a fact, which is contrary to the case; for it is said, that the insurance was not made in consequence of *Thomas's* letter. But what is the fact? The plaintiff's letter to *Fisher* desires him to insure, as soon as the bills of lading are sent. By whom were they to be sent? By *Thomas*; then he refers to *Thomas* for all the information, and as the foundation of the insurance. The plaintiff, I dare say, is innocent; and so is the defendant. But if the plaintiff build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at *Guildhall*, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. In this case, the plaintiff trusted; not the defendant: *Thomas* had very material information, which he did not communicate; the

* P. 214 * consequence of which is, that the policy is void, and the *postea* must be delivered to the defendant.

From these cases, the principle, which we sought to establish, is evident, *viz.* that whether the fraud or misrepresentation be the act of the insured, or of his agent, the policy is void, and the contract between the parties is vacated and annulled.

To have troubled the reader with all the cases that have come to trial upon the ground of fraud, would have swelled this chapter to the size of a volume; and at the same time would be wholly unnecessary, as every case of fraud must depend upon its own circumstances. It was thought sufficient to lay down the general principles, which the courts have adopted upon the subject, and which are applicable to each division of it as stated in the beginning of this chapter; and to cite two or three cases under each head, in order to confirm and illustrate the positions and principles advanced.

But as fraud is a charge of a very serious nature, materially affecting a man's credit, character and reputation, the law of *England* will never presume that any one is guilty of it; nor set aside a contract on that ground, unless it be *fully and satisfactorily* proved. The consequence of this favourable presumption is, that the burden of proof lies upon the person, who wishes

wiſhes to avail himſelf of the fraudulent conduct imputed. Thus if the inſured is ſuppoſed to be guilty of fraud, the proof of it falls upon the underwriter; becauſe he is the perſon, who is to derive a benefit from ſubſtantiating the charge. This is not only the law of *England*, but the law of common ſenſe, founded on principles of equity and juſtice. Although it has been ſaid, that fraud will not be preſumed, unleſs it be *fully and ſatisfactorily proved*, it is not intended to convey an idea, that there muſt be a *poſitive* and *direct* proof of fraud, in order to annul the contract. The nature of the thing itſelf, which is generally carried on in a ſecret and clandeſtine manner, does not admit of ſuch evidence; and therefore, if no proof but that of actual fraud were allowed in ſuch caſes, much miſchief and villainy would enſue, and paſs with impunity. Circumſtantial evidence is all that can be expected; and indeed, * all that is neceſſary to ſubſtantiate ſuch a charge. The prejudice entertained againſt receiving circumſtantial evidence, is carried to a pitch wholly inexcuſable. In the caſe before us, we have already ſhewn, it muſt be received; becauſe the nature of the enquiry for the moſt part admits of no other, and conſequently it is the beſt poſſible evidence that can be given. But taking it in a more general ſenſe, a concurrence of circumſtances (which we muſt always ſuppoſe to be properly authenticated, otherwiſe they weigh nothing) forms a ſtronger ground of belief, than poſitive and direct teſtimony generally affords: eſpecially when unconfirmed by circumſtances. The reaſon of this is obvious: a poſitive allegation may be founded in miſtake, or what is too common, in the perjury of the witneſs; but circumſtances cannot lie; and a long chain of well connected fabricated circumſtances, requires an ingenuity and ſkill rarely to be met with; and ſuch a conſiſtency in thoſe who come to ſupport thoſe circumſtances, by their oaths, as the annals of our courts of juſtice can ſeldom produce. Beſides, circumſtantial evidence is much more eaſily diſcuſſed, and much more eaſily contradicted by teſtimony, if falſe; than the poſitive and direct allegation of a fact, which, being confined to the knowledge of an individual, cannot poſſibly be the ſubject of contradiction founded merely on preſumption and probability.

Roccus Not. 51. 78.

* P. 215

Another queſtion upon this ſubject remains to be diſcuſſed; and that is, whether the underwriter is bound to return the premium, or is liable to an action for it, in a caſe where fraud has been proved againſt the inſured; and conſequently where the contract is void, and no riſk has been run. The ordinances of *France* declare, that if fraud be proved againſt the inſured, he ſhall be obliged to reſtore to the inſurer that, which he has received from him, and alſo to pay him double the premium: and if fraud be proved againſt the inſurer, he ſhall in like manner be liable to reſtore the premium, and to pay double the ſum inſured

Ord of Lew. 14. tit. Inſ. art. 41.

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insured to the owner of the property. A learned commentator upon these ordinances observes, that if this article suppose a full conviction of the crime, the punishment is too small: and that here the punishment of the assurer and assured is nearly equal, although the crime of the assured is much greater, when the difference between the premium, and the value of the property is considered. Indeed, the idea of enriching one man by the punishment of another is itself a strange one; and somewhat inconsistent with the present notions of criminal justice. The ground upon which it has been introduced into the edicts of *France* upon insurances, must have been this, that as the insurer in one case, and the insured in the other, runs a considerable risk by fraudulent allegations or concealments, they shall severally be entitled to the sums stated in the ordinance, as a recompence for the risk they so incurred.

2 Valin, 96.

* P. 216

The law of *England* has hitherto been silent upon this subject, there being no positive declaration of the legislature respecting it: and our courts of justice have not as yet adopted any general rule, with respect to the return of premium in cases of fraud. In two or three instances in the Court of Chancery, where the underwriters have been relieved from the payment of the sums insured, on account of fraud; the decree has directed the premium to be returned.

Thus in a case in the year 1690, the defendant and others had come to the insurance office, and bought a policy for insuring the life of one *Horwell*, (upon whose life they had no concern or interest depending) for a year; and the policy ran whether interested or not interested, at a premium of 5*l. per cent.* They took this way of drawing in subscribers: they agreed with one *Marwood*, a known merchant upon the Exchange, and a leading man in such cases, to subscribe first; but in case *Horwell* died within the year, *Marwood* was to lose nothing, but on the contrary was to share what should be gained from the other subscribers. Upon the credit of *Marwood's* subscribing, several others (who had enquired of *Marwood* about *Horwell*, who was his neighbour) subscribed likewise. *Horwell* lived about four months, and then died; and this bill was brought to be relieved against the policy: and this matter being all confessed by the answer, the court decreed the policy to be delivered up, *and the premium to be repaid.*

Wittingham v. Thornborough. Precedents in Chancery, p. 20. and 2 Vern. 206.

So also in the case of *Da Costa v. Scandret*, which has already been cited in a former part of this chapter, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the insured.

Da Costa v. Scandrett. 2 P. Wil. 170. Vide ante p. 179.

It is true, that during the argument in the case next to be quoted, the counsel cited a case of *Rucker* v. *Hellingbury*, in which the Master of the Rolls had been of a different opinion from that delivered in the two preceding cases. But Lord *Mansfield*

* P. 217

Mansfield ſaid, that there muſt be ſome miſtake in reciting the caſe before the Maſter of the Rolls; for the practice of the Court of Chancery, was certainly agreeable to the two former caſes.

The caſe, in which this obſervation was made, was an action on a policy of inſurance on a ſhip, with a count of a general *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe: and damages were laid at 98*l.* The trial was had, under a decree of the court of Chancery, where the now defendant, the inſurer, being there complainant, *had offered to pay back the premium, which was* 10*l.* No money was, in the preſent caſe, paid into court; though the uſual courſe in theſe caſes is for the defendant, the inſurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his uſe; although they were of opinion againſt the policy, upon the foot of fraud; and found againſt it, as being fraudulent. In fact, the firſt underwriter was only a decoy-duck, to induce other perſons to underwrite the policy: and it had been previouſly agreed between the inſured and him, that he ſhould not be bound by ſigning the policy; which this court conſidered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield* (before whom this cauſe was tried) and of the counſel on both ſides, it was agreed to bring this queſtion before the court, whether, upon a policy of inſurance being found fraudulent, the premium ſhould be returned to the plaintiff (the inſured) or retained by the defendant (the inſurer.) The caſes abovementioned were quoted by the counſel for the plaintiff; but they being all in Chancery, Lord *Mansfield* ſaid, he wanted to know whether there was any common law determination to the ſame effect. As it did not appear that there was, his lordſhip ſaid, It was plain what muſt be done in this caſe; for he looked upon *the offer made* by the complainant's bill in equity, to be the ſame thing as if the money had *actually been brought into court* in the preſent caſe.

Wilſon v. Duckett. 3 Burr. 1361.

But although the common law has been ſo ſilent upon the ſubject, as not to lay down any general rule; and although in * all the caſes ſtated, the premium was reſtored; yet if the fraud is notorious, palpable, and groſs in its nature, the court may order, and has ordered the underwriter to retain the premium.

* P. 218

Thus where an action was brought by the inſured to recover 150*l.* being the amount of the defendant's ſubſcription; the ground of refuſal was, that the inſurance was fraudulent; and that the plaintiff knew of the loſs of the ſhip, at the time of effecting the policy. The counſel for the plaintiff were under the neceſſity of admitting that their client had made ſome fraudulent inſurances upon this very ſhip, ſubſequent to the one now

Tyler v. Horne. Sittings at Guildhall after Hil. T. 1785.

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now in diſpute; but contended that news of the loſs of the ſhip had not arrived, till after this particular one was effected. The evidence, however, was ſo ſtrong as eaſily to convince the jury, that the plaintiff had received information of the loſs before the order for making the inſurance was given to the broker; and they found a verdict for the defendant.

Lord *Mansfield* ſaid, The fraud was ſo groſs, that the premium ſhould not be recovered from the underwriter.

It is proper, however, to obſerve, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies againſt him, at the ſuit of the inſured, to recover the premium. Thus it was ſaid by Lord *Mansfield*, in the

3 Bur. 1909. caſe of *Carter* v. *Boehm*, which has already been quoted at large in this chapter: "The policy would be void againſt the "underwriter, if he concealed any thing; as, if he inſured a "ſhip on her voyage, which he privately knew to be arrived; "and *an action would lie to recover the premium.*"

Ord. of Amſterdam art. 56. 2 Mag. 146.

By ſeveral of the foreign ordinances, the puniſhment of fraud, in matters of inſurance, is exceedingly ſevere. By thoſe of *Amſterdam* it is declared, "that as contracts of inſurance "are contracts of good faith, wherein no fraud or deceit "ought to take place, in caſe it be found, that the inſured or "inſurers, captains, ſhippers, pilots, or others uſed fraud, de-"ceit or craft, they ſhall not only forfeit by their deceit and "craft, but ſhall alſo be liable to the loſs and damage occaſioned "thereby, and by corporally puniſhed for a terror and ex-"ample to others; *even with death*, as pirates and manifeſt "thieves, if it be found that they have uſed notorious mal-

P. 219 " verſation or craft." The ordinances of *Middleburg* contain a proviſion exactly in the ſame words. At *Stockholm* alſo,

Art. 30. 2 Mag. 76. 2 Mag. 288.

it has been declared, that ſuch an offender, beſides reſtitution to the party injured, ſhall, according to the circumſtances of every particular affair, be puniſhed in his eſtate, honour, and life.

Frauds in contracts of inſurance have not as yet had any puniſhment affixed to them by the laws of *England*, that I have been able to learn: but there are one or two caſes which have been declared to be felonies by poſitive ſtatutes, where the act committed has been to the prejudice of the underwriters.

1 Ann. ſt. 2. c. 9. ſ. 4.

By a ſtatute in the reign of queen *Anne*, it was enacted, that if any captain, maſter, mariner, or other officer, belonging to any ſhip, ſhall wilfully caſt away, burn, or otherwiſe deſtroy the ſhip, unto which he belongeth, or procure the ſame to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that ſhall load goods thereon, (or by a

4 Geo. 1. c. 12. ſ. 3.

ſubſequent ſtatute, to the prejudice of any perſon or perſons that ſhall underwrite any policy or policies of inſurance thereon)

ſhall

ſhall ſuffer death as a felon; and the benefit of clergy is taken away from this offence by 11 *Geo.* 1. *ch.* 29. CHAP. XI.

Theſe are the only proviſions, which the legiſlature of this country has, as yet, thought proper to make for the prevention of crimes of this enormity: but as the records of our courts of juſtice evidently prove that frauds are too frequent in policies of inſurance, greater ſeverity than merely annulling the contract ſeems neceſſary, in order to put a ſtop to ſuch offences.

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Of Sea-Worthineſs.

HAVING in the preceding chapter treated very fully of the influence which fraud has upon the contract of inſurance; we proceed to ſhew, that other circumſtances, in which no fraud whatever can be diſcovered, or even ſuſpected, will alſo vitiate and annul the policy. Of this nature is the doctrine of Sea-Worthineſs. Upon this point it has been determined, that every ſhip inſured muſt, at the time of the inſurance, be able to perform the voyage, unleſs ſome external accident ſhould happen; and if ſhe have a latent defect wholly unknown to the parties, that will vacate the contract; and the inſurers are diſcharged. This doctrine is founded upon that general principle of inſurance law, that the inſurers ſhall not be reſponſible for any loſs ariſing from the inſufficient or defective quality or condition of the thing inſured.

There is in the contract of inſurance a tacit and implied agreement that every thing ſhall be in that ſtate and condition, in which it ought to be: and therefore it is not ſufficient for the inſured to ſay, that he did not know that the ſhip was not ſea-worthy; for he *ought* to know that ſhe was ſo, at the time he made the inſurance. The ſhip is the *ſubſtratum* of the contract between the parties; a ſhip not capable of performing the voyage is the ſame, as if there were no ſhip at all; and although the defect may not be known to the perſon inſured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter: becauſe ſuch a defect is not the conſequence of any external misfortune, or any unavoidable accident, ariſing from the perils of the ſea, or any other riſk, againſt which the underwriter engages to indemnify the perſon inſured. To ſupport a contrary doctrine would introduce a variety of frauds, as it would probably ſubject the underwriter to account for the loſs, * diminution, or waſte, which may happen from the neceſſary and ordinary uſe of the thing inſured; or the wear and tear of * P. 221

the

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the ſhip in the common courſe of the voyage: and all of theſe are riſks, to which the inſurer has never been conſidered as expoſed. From what has been ſaid it appears, that the ground of deciſion in this caſe is perfectly diſtinct from any principle of fraud: that it depends merely upon this, that the inſured is preſumed to be better acquainted with the ſtate and condition of his ſhip than any other man; and that he has tacitly undertaken, that ſhe is in a condition to perform the deſtined voyage. But although the inſured ought to know whether his ſhip was ſea-worthy or not at the time ſhe ſet out upon her voyage; yet he may not be able to know the condition ſhe may be in, after ſhe is out a twelvemonth: and therefore, whenever it can be made appear that the decay, to which the loſs is atributable, did not commence till a period ſubſequent to the inſurance, as ſhe was ſea-worthy at the time, the under-writer, it is preſumed, would be liable. Indeed, in a very late caſe upon another point, but where the ſame principle was much relied upon, Lord *Mansfield* ſaid; "By an implied warranty every ſhip inſured muſt be "tight, ſtaunch, and ſtrong; but it is ſufficient if ſhe be ſo, "at the time of her ſailing. She may ceaſe to be ſo in twenty-"four hours after departure, and yet the underwriter will con-"tinue liable." Every caſe of this kind, it is true, muſt depend upon its own circumſtances, but when they are once aſcertained, the rule of law is clear and deciſive. The only material caſe upon this ſubject in the law of *England* is that of the *Mills* frigate, which underwent a variety of diſcuſſion in ſeveral courts, and was finally determined in favour of the inſurers. I have uſed my utmoſt endeavours to procure a copy of the opinions of the judges upon that caſe; but they have been ineffectual: therefore the reader muſt be ſatisfied with a full ſtatement of the circumſtances, as they appeared upon the demurrer to the evidence, and with the judgment given upon that demurrer, as it is recorded.

5 Burr. 2804.

Eden v. Parkinſon, Doug. 708.

Before the proceedings in this caſe are ſtated, it will be neceſſary to mention, that an action had been brought in the court of Common Pleas on the ſame policy againſt one of the underwriters; and Lord *Camden*, who tried that cauſe, directed the * jury to find a verdict for the plaintiff: but upon a motion for a new trial, his Lordſhip declared, that he had changed his opinion: and the whole court of Common Pleas laid down the principles above ſtated, and directed a new trial. Upon the ſecond trial, Lord *Camden* ſtated to the jury the opinion he had formed upon the ſubject, and a verdict was accordingly given for the defendant, which upon a ſubſequent application, the court of Common Pleas refuſed to ſet aſide. The plaintiffs then commenced a new action in the court of exchequer againſt another of the underwriters, and which is now the ſubject of our attention.

* P. 222

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This was an action on a policy of insurance, lost or not lost, at and from the *Leeward Islands* to *London*, warranted to sail on or before the 26th of *July*, upon any kind of goods, wares, and merchandizes; and also upon the body, tackle, *&c.* of and in *the good ship or* vessel called the *Mills Frigate*, beginning the adventure on the goods from the loading thereof on board the said ship at *St. Kitt's*, and upon the ship from her arrival at the *Leeward Islands*. The defendant undertakes to indemnify against the usual risks, for a premium of 2*l.* 10*s. per cent.* The loss was described in the first count of the declaration in these words: "That the said ship, after her departure from *Nevis* on "her voyage, and during her said voyage, sailing and proceeding "on the high seas by and through the force of winds and tem- "pestuous weather, and by and through the mere perils and "dangers of the seas, sprung divers leaks, and became very lea- "ky, crippled, bulged, disjointed, split, and wholly lost." In the second count the loss is alleged thus: "by and through "the mere perils and dangers of the seas, and by the starting "and loosening of one or more plank or planks of the said ship, "and by accidentally springing one or more leak or leaks, the "said ship became very leaky, crippled, *&c.* and totally unable "to proceed on, or perform the said voyage." There were two other counts in the declaration upon a policy on freight, to recover from the underwriter the amount of his insurance upon that also; and a fifth count for money had and received to the plaintiff's use. The defendant pleaded the general issue; with a notice of set off, having paid the premiums into court.

* This cause came on to be tried before Lord Chief Baron *Parker*; and the defendant demurred to the evidence produced on the part of the plaintiff. The demurrer follows in these words: Thereupon the said *John* and *Thomas Mills* (the plaintiffs) shew in evidence to the jury to prove and maintain the issue within mentioned on their part, to wit, that the defendant underwrote the policy of insurance, and that the plaintiffs were interested to the amount as in the declaration is mentioned: That the ship in question was a *French* built ship, and known to be so to the defendant at the time he underwrote the said policy: That the timbers of *French* ships are usually fastened with iron bolts or spikes, which are liable to grow rusty; and when the same are grown rusty, the timber of such ships frequently become loose at once, and the ships are rendered incapable of bearing the sea, without any perceptible symptoms of decay: That the ship in question was purchased by the plaintiffs in the year 1757: that since that time she has been generally employed by the plaintiffs, who are *West India* merchants, in that trade; and large sums have constantly been insured on her and her cargoes: That in *February*, 1764, being bound to the *Leeward Islands*, and back again to *London*, she sailed on her

* P. 223

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voyage: that before she sailed from *London* on that voyage, the plaintiffs ordered the captain to have every thing done to the ship, which he should think proper to repair her: That in pursuance of such orders, the ship was put into dock and repaired, where the ship carpenter did all such repairs to her as he was ordered, the expences of which amounted to about 100*l.* of which about 30*l.* was for the sheathing and other repairs of her hull, and the residue in her upper works: that nothing more appeared to the ship carpenter, or the captain, to be wanting to make her fit and complete for the said voyage; but her iron bolts and spikes were not then examined, which could not be done without taking off her sheathing; an act never done where (as the case is here) the ship had been sheathed a little time before: that *George Hayley*, Esq; the first underwriter on this policy, and many other persons by whom policies of insurance are generally underwritten, keep a register, in which all ships usually insured by them, are entered with an account of the age, construction and visible goodness of the vessels, and to whom they belong, and also employ a surveyor, whose busi-

* P. 224 * ness it is to survey such ships: that the ship in question, at the time of underwriting the policy, and long before, had been entered in such register; and previous to her last outward bound voyage, had been surveyed by one *Thomas Whitewood*, who was then employed by the said *George Hayley*, and other underwriters, as such surveyor; and as far as appeared to the said *Thomas Whitewood*, was in good condition, and perfectly fit to undertake a voyage to and from the *Leeward Islands*; but the surveyor did not, neither could he examine the bolts and spikes for the reasons aforesaid; but did survey as far as is ever practised in such cases: that the said *George Hayley* had often before underwrote policies on the said ship and her cargoes; and the witness, who was the insurance broker, said he believed Mr. *Hayley* knew as much of the condition of the ship as the plaintiffs did, and particularly on the outward bound voyage to the *Leeward Islands*, he underwrote 400*l.* on this ship: that in such last outward bound voyage, the ship met with a great deal of bad weather; was very leaky, and could not get into *Madeira*, where she was ordered to touch; but was obliged to bear away for the island of *Nevis*: that she arrived at the island of *Nevis* on the first of *April*, 1764, and from thence went to the island of *Saint Christopher*, where she delivered her outward bound cargo, and had such repairs done to her, as were then thought necessary, and to all appearance put into a proper condition for her voyage home; but her bolts and spikes were not, nor could be examined there: that about the end of the said month of *April*, the ship sailed from *St. Kitt's* to *Nevis*, where the captain had been promised a loading for her home: that on her arrival at *Nevis*, the planters, knowing she had been leaky in her outward bound voy-

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age, were not willing to put ſugars on board her; and that in order to ſatisfy the planters there, that ſhe was in a proper condition to carry a cargo of ſugars to *London*, they propoſed to the captain, as a meaſure which would be fully ſatisfactory to them, that he ſhould ſubmit the ſhip to be ſurveyed by all the captains then in the harbour, being ſix in number; and told him, that if they ſhould report her to be fit for a voyage to *London*, they would then load her with ſugars: that the captain did ſubmit to ſuch ſurvey, though it would have been for the intereſt of the ſaid captains to report the ſhip unfit for the voyage; as by that means they would have had an opportunity of gaining more freight and ſooner: that on the 8th day of *May*, 1764, the ſaid captains after having ſurveyed her carefully, but without examining her bolts and ſpikes, which could not be done, there ſigned the following report * P. 225 "*Nevis*, "*May* 8th, 1764. At the requeſt of Captain *George Finch*, "of the ſhip *Mills Frigate*, we the ſubſcribers did repair on "board the ſaid ſhip, and after due examination, it did appear "to us, that the occaſion of the ſhip's making more water than "uſual on her voyage from *London* to this place, was occa-"ſioned by ſome neglect in caulking the ſaid ſhip, which may "very eaſily be made tight, the ſaid ſhip otherwiſe appearing "to us to be ſtrong and ſound; and when caulked, we are of "opinion, will be fully ſufficient to carry a cargo of ſugars to "*London*, *John Shepherd*, *&c.*" That afterwards the ſhip was caulked according to the ſaid report, and that thereupon the planters ſent their ſugars on board, and the ſhip was ſoon loaded with about three hundred and ſeventy hogſheads of ſugar: that during the time of her loading, and until and at the time of her ſailing, which was about two months, the ſhip continued tight, appeared to be in good condition, and made no more water than the beſt ſhips uſually do, and are expected to do: that the ſhip ſailed from *Nevis* on the 25th day of *July*, 1764, about eight o'clock in the evening, and the next day about four o'clock in the afternoon, without any bad weather or extraordinary ſwell of the ſea, ſhe ſprang a leak, and the captain was obliged to bear away for *St. Chriſtopher*, where he arrived on the 28th of *July*: that on his arrival there, he got the ſhip unloaded to ſee what was the matter with her, when it appeared that ſhe had ſtarted a plank: that he thereupon applied to the judge of the Court of Vice Admiralty for a warrant to ſurvey the ſhip; and a warrant was granted to four captains, and two ſhip carpenters, or any three of them; four of whom did, according to ſuch warrant, ſurvey the ſaid ſhip, and did report, that ſhe was unfit to proceed on her voyage without being thoroughly repaired; and that the expence of ſo repairing her there, would amount to more than the value of the ſhip and freight; and ſhe was

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therefore condemned by the ſaid court as unfit for the ſaid voyage: that ſome of the iron bolts and ſpikes, with which the timbers of the ſhip in queſtion, like other *French* built ſhips, were faſtened, were broken in the plank that was ſo ſtarted;

P. 226 * which the captain and the ſaid ſurveyors felt, by paſſing up their hands between the plank and the ſhip; and which appeared upon farther opening the ends of the plank; and that the ſaid plank was ſtarted from one end to the other: that it was owing to the ſaid bolts and ſpikes being grown ruſty and decayed, as then appeared to the captain and ſurveyors, that ſuch plank ſtarted: that he believed the ſurveyors, who condemned her, thought the ſame; wherefore, and ſuppoſing the other bolts and ſpikes in the ſhip were alſo grown ruſty and decayed though that could not be known for certain, without ripping off her planks, and making a more ſtrict examination, the ſurveyors made their ſaid report of condemnation: that the ſaid plank was not taken off, nor could it be, without ſinking the ſhip, but continues at *St. Chriſtopher's* as a hulk: that on the aforeſaid account, it was then concluded, and is now believed by the captain, *that the ſaid ſhip was not fit for the inſured voyage* home, at the time ſhe ſo ſailed from *Nevis* for *London*, *though to all outward appearance, ſhe was a very good ſhip*; and as he then believed, *proper for the voyage*; and ſuch a ſhip as he, *from her outward appearance, ſhould have had no objection to ſail in again*; but had he known the decayed condition of her ſaid bolts and ſpikes before he ſet ſail on his homeward bound voyage, he would not have ventured his life in her: that there is no dock, nor ſcarce any materials for repairing ſhips at *St. Chriſtopher's*, nor could ſhe ſail to any other place to be repaired; and that if this misfortune had happened in *North America*, or *England*, where there are proper docks and materials, ſhe might have been repaired for three or four hundred pounds: that while the ſaid ſhip was firſt at *St. Chriſtopher's*, before ſhe had taken in her cargo, namely, on the 23d of *April*, 1764, the captain wrote the following letter to the plaintiffs.

„ *St. Chriſtopher's*, *April*, 23d, 1764

" Gentlemen,

" I take the firſt opportunity of acquainting you, that I ar-
" rived at *Nevis* after a moſt diſmal paſſage on the firſt inſtant.
" On the ſixth of *March*, at day break, I made the iſlands
" *Deſerts*, diſtant about four leagues, run down for *Madeira*,
" with a freſh gale at E. S. E. till four in the afternoon, when
" being within a mile off the ſhore, and judging about five or
" ſix miles off *Fenchall Road*, *a very hard and dark ſquall*

* P. 227 " * *took us ſuddenly with ſuch violence, that I was obliged to clear*
" *off the land under the courſes.* It was exceſſively hazy the
" whole evening after, that one could hardly ſee the ſhip's length;

" ſo

" ſo that it would have been the greateſt imprudence to have run " the riſk of overſhooting our port, or running aſhore. The " gale increaſed, and in the night, came round to the N. E. " and *the ſhip ſtrained ſo much by the preſſure of ſail we were " obliged to carry on her in that great ſea, that it was with the " utmoſt difficulty we could keep her free.* On the eighth, at " nine in the morning, reckoning myſelf nineteen leagues to " leeward of *Madeira*, *our ſhip ſo looſened*, that we could not " carry ſail upon a wind; and ſeeing no probability of the " wind ſhifting or abating enough to give us a chance of beat " ing up, bore away for *Nevis*, judging it better for the preſer- " vation of the whole than to run any hazard in endeavour- " ing for the *Canaries* in our weak, leaky and diſtreſſed condi- " tion. I have conſulted with Mr. *Cottle*, the counſellor here, " who adviſes me to ſell the flour and lime at public vendue, " and to carry the iron hoops, *&c.* back to *England*. *As the " ſhip's complaint has been chiefly in her upper works, I am obli- " ged to have her new nailed from the wail upwards*; and hope " you will find that what repairs are neceſſary to be made here, " are conducted with all the frugality circumſtances will admit " of."

That the plaintiff's received this letter in *London* on the 13th day of *June*, 1764, and a day or two afterwards, gave it to *Matthew Towgood*, an inſurance broker, to get 1000*l.* inſured on the freight home for the uſe of the owners, and 250*l.* on their fourth part of the ſaid ſhip: that the ſaid *Towgood* firſt ſhewed the policy in queſtion, and the letter to the ſaid *George Hayley*, on the 19th of *June*, 1764, who, after reading over the letter, aſked him what intereſt he had to inſure; to which the broker anſwered, ſhip, freight and cargo; and that he might write which he pleaſed: that thereupon the ſaid *George Hayley* ſaid he would underwrite the ſhip, ſaying ſhe would come home ſafe enough, notwithſtanding the damage which the ſaid letter imported ſhe had received, as it was a ſummer voyage; but that ſhe would very likely damage her cargo: that the ſaid *George Hayley* was going to underwrite the ſaid policy for 300*l.* on the ſaid ſhip, and had wrote the figure 3; but on the ſaid *Matthew* * *Towgood's* telling him, he was a bold man to write three hun- * P. 228
dred pounds after reading the ſaid letter, the ſaid *George Hayley*, ſtruck out the figure 3, and converted it into a 2, and accordingly underwrote the ſaid policy for the ſum of two hundred pounds on the ſaid ſhip: that the ſaid *Matthew Towgood* ſhewed the ſaid letter to the ſaid defendant *Roebuck*, and all the other underwriters on the ſaid policy, before they underwrote the ſame; and the ſaid defendant ſays, that the evidence aforeſaid, in manner and form aforeſaid, ſhewn by the plaintiffs to the jury, is not ſufficient in law to maintain the iſſue within joined on the part of the plaintiffs; and that he the defendant to

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the evidence aforeſaid hath no neceſſity, nor by the law of the land is obliged to anſwer. Wherefore he prays judgment, and that the jury may be diſcharged from giving any verdict upon the iſſue.

The plaintiffs join in demurrer.

Upon this demurrer, judgment was given in the Court of Exchequer for the underwriter. A writ of error was then brought in the Court of Exchequer Chamber, which was referred to Lord *Mansfield*, and Lord Chief Juſtice *Wilmot*, who, after argument, alſo reported their opinions to be in favour of the defendants; agreeable to which report, judgment was accordingly pronounced. This is the only account, which can now be given of this caſe, as the report upon theſe occaſions is generally made in private, and the reaſons, upon which it is founded, are not publickly given. But from the above very accurate ſtatement which has been procured from the record, it will appear, that the deciſion did not turn upon any fraud or concealment of circumſtances; but on the contrary, every thing was done in the moſt fair and honourable manner, and the underwriter was fully informed of every event, with which the inſured was himſelf acquainted. The caſe was decided entirely upon the principle of ſea-worthineſs: that however innocent or unfortunate the inſured might be, yet if the ſhip was not ſea-worthy, at the time of inſuring, there was no contract at all between the parties; becauſe the very foundation of the contract, the ſhip, was in the ſame condition, as if it did not exiſt. That the concluſion thus drawn from the judgment given in the Exchequer Chamber, is not larger or more extenſive than

* P. 229 * the deciſion will warrant, is evident from what was ſaid by Lord *Mansfield*, when upon a ſubſequent occaſion, the caſe of the *Mills Frigate* was relied upon in argument at the bar.

5. Bur. 2802. In the caſe of the Earl of *March* v. *Pigott*, which came before the court of King's Bench in the year 1771, the caſe of the *Mills Frigate* having been mentioned, Lord *Mansfield* ſaid, The inſured ought to know whether his ſhip was ſea-worthy or not, at the time ſhe ſet out upon her voyage: but how ſhould he know the condition ſhe was in after ſhe had been out a twelvemonth? It is true, the propoſition laid down by the counſel in that caſe is merely, "that the caſe of the *Mills Fri-* "*gate* was an inſurance upon a ſhip, which had a latent defect "totally unknown to the parties: and the inſurers were holden "not liable on account of the ſhip's not being ſea-worthy, "though ſuch defect was not known." Lord *Mansfield* is then reported to have ſaid, "I differ totally in opinion from that doctrine;" and yet his Lordſhip is made to conclude with the ſentence above ſtated, which is in effect the ſame with that which the reporter has put into the mouth of the counſel; and which in truth contains the whole doctrine of ſea-worthineſs,

when

when the exception put by Lord *Mansfield* is added, namely, that the insured shall not answer for the sufficiency of the ship, after she has been out a considerable time. The probability is, that the counsel laid down the proposition in more extensive terms than the reporter states it, namely, that if the ship was not sea-worthy *at any time* during the voyage, the insurers would be discharged. By admitting this presumption, the whole will be easily reconciled; for then Lord *Mansfield's* denial of such extensive doctrine is supported and illustrated by the distinction, which he afterwards takes in the conclusion of the sentence.

It is singular, that the decision, which has occupied the whole of this chapter, should have occasioned so much discussion at the time it was determined, as that pamphlets were written upon both sides of the question: especially when it is considered, that the doctrine there established is by no means novel in itself, and is entirely consonant to the laws of all the maritime and commercial nations in *Europe*.

* In the ordinances of *Lewis* the fourteenth it is declared, that decay, waste or loss, which happens from the internal defect of the thing insured, shall not fall upon the underwriter. A commentator upon these ordinances has gone into the reason and principle of such a regulation, and has shewn the propriety of it. He sets out by observing, that this doctrine is of a date as ancient as the period when the *French* treatise called *Le Guidon* was published, which was about the year 1661, at which time, as appears by a reference to the book itself, it was considered as a settled principle, that losses, happening from causes of this nature, were not to be a charge upon the underwriter. The same author has also shewn, that such a provision is adopted in favour of the insurers by the ordinances of *Rotterdam* and *Amsterdam*. After stating these circumstances, he proceeds to say, that when a ship is deemed incapable of finishing her voyage, the question whether this event is a charge upon the underwriters or not, depends upon another; namely, whether it happened by the violence of the sea, or other fortuitous circumstance, or whether the disability proceeds from age and rottenness. This will be determined by the enquiry which was made before the departure of the ship, in order to judge, whether it was in a condition to perform the voyage or not: if the latter was the case, the insurers ought not to answer. In another part of his work after laying down the same doctrine, he declares, that the indemnity will be void, even though the ship has been examined before her departure, and declared capable of performing the voyage; since the event has shewn clearly, that on account of latent defects it was no longer navigable; that is, if it were proved that parts of the ship were so rotten, weakened, and destroyed, that she was not in a proper state to resist

* P. 230 Ord. of Lew. 14th, tit. insur. art 12. 2 Val. 80.

C. 5. art. 8.

2 Mag. 90. 140. 2 Val 81.

1 Val. 654.

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the ordinary attacks of wind and ſea, inevitable in every voyage, then the underwriters are diſcharged. The reaſon is, that the examination of the ſhip before her departure extends only to the external parts, becauſe ſhe is not unripped; at leaſt not ſo as to diſcover the interior and latent defects, for which the owner or maſter of the ſhip continues always reſponſible, and that with the greater juſtice, becauſe they cannot be wholly ignorant of the bad ſtate of the ſhip: but ſuppoſing them to be ſo, it is the ſame thing, being indiſpenſably bound to provide a good ſhip, able to perform the voyage.

* P. 231 * The opinion of this learned foreigner is ſupported by two of his countrymen, *Pothier* and *Emerigon*.

Pothier Tr. d' Aſſurance. n. 66. 1 Emerigon. p. 580.

Having thus ſhewn that the doctrine of ſea worthineſs, as eſtabliſhed by the deciſions of our courts of juſtice, is confirmed by the declaration of foreign laws, and by the opinions of foreign writers; it is ſufficient now to ſay, that where the ſhip is not ſea-worthy, the policy of inſurance is void, as well where the inſurance is upon the goods to be conveyed in the ſhip, as when it is upon the ſhip itſelf. For whenever a caſe ariſes with reſpect to damage done to goods through the inſufficiency of the ſhip, the queſtion, whether the maſter or owner is liable to make good the loſs, depends upon aſcertaining, whether the ſhip was in a condition to perform the voyage at the time of her departure, or became defective from bad weather, and the perils of the wind and ſea.

2 Val. 164.

* P. 232

* CHAPTER THE TWELFTH.

Of Illegal Voyages.

WE proceed now to the conſideration of another circumſtance by which the contract of inſurance is vacated and annulled *ab initio:* and it is this; that whenever an inſurance is made on a voyage expreſsly prohibited by the common, ſtatute, or maritime law of the country, the policy is of no effect. The principle, upon which ſuch a regulation is founded, is not peculiar to this kind of contract; for it is nothing more than that which deſtroys all contracts whatſoever: that men can never be preſumed to make an agreement forbidden by the laws; and if they ſhould attempt ſuch a thing, it is invalid, and will not receive the aſſiſtance of a court of juſtice to carry it into execution.

The moſt material caſe upon this point is that of *Johnſton* and *Sutton*, which came on to be argued in the year 1779, and received the ſolemn opinion of the Court of King's Bench.

It

It was an action on a policy of insurance on goods, on board the ship *Venus*, "lost or not lost, at and from *London* to *New York*, warranted to depart with convoy from the channel for the voyage;" The cause was tried before Lord *Mansfield* at *Guildhall*, and a verdict was found for the plaintiff. The defendant obtained a rule to shew cause why there should not be a new trial. The facts, upon his Lordship's report, appeared to be these: the ship was cleared for *Halifax* and *New York*. She had provisions on board, which she had a licence to carry to *New York*, under a proviso in the prohibitory act of 16 Geo. 3. c. 5. But *one half of the cargo, including the goods, which were the subject of this insurance, was not licensed*, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe* to allow the entry of unlicensed goods at *New York*; and though there were bonds * usually given at the Custom House here, by which the captain engaged to carry the goods to *Halifax*, those bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpose at *New York*, declaring, that they were landed there. *The commander in chief had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods.* The *Venus* was taken in her passage to *New York* by an *American* privateer. The first section of the statute prohibits all commerce with the province of *New York* (amongst others) and confiscates all ships and their cargoes, which shall be found trading, or going to, or coming from trading with them. In section the second, there is a proviso, excepting ships laden with provisions for the use of his majesty's garrisons or fleets, or for the inhabitants of any town possessed by his majesty's troops, provided the master shall produce a licence specifying the voyage, *&c.* and the quantity and species of provisions; but by the same *proviso*, it is declared, that goods not licensed, found on board such ship, shall be forfeited. After argument, upon the motion for a new trial,

Johnson v. Sutton. Doug. 241.

* P. 233

16 Geo. 3. c. 5.

Lord *Mansfield* said.—The whole of the plaintiff's case goes on an established practice, directly against an act of parliament. If the defendant did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal to send the goods to *New York*, and, *in pari delicto, potior est conditio defendentis.* It is impossible to bring this within the cases cited (*a*), because here there was a direct contravention of the law of the land. The rule for a new trial was made absolute.

(*a*) These were cases of insurances on ships trading contrary to the revenue laws of foreign countries, of which more will be said hereafter.

From

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From this case much information is to be collected; for, 1st. the principle advanced at the beginning of the chapter is established, that is, that an insurance of a voyage, which is prohibited by statute, is void. This case also serves to remove a distinction, which occurs in a very respectable writer. The learned *Roccus* observes, that if such an insurance, as that of which we have been speaking, should be made, *ignorante assecuratore*, the insurer is discharged: from whence we are to infer, that in his opinion, if the insurer was acquainted with the nature of the voyage, he would continue liable. But the doctrine of the court of King's Bench overturns such a distinction, because the very contract is a nullity, and a court of justice can never lend its authority to substantiate a claim, founded upon a contract which is absolutely repugnant to the known and established laws of the land. Of this opinion is *Bynkershoek*, who says, that even if it be told to the underwriter, that the voyage is illicit, he shall not be bound; because the contract is null and void, and where that is the case, the compliance with the terms of it depends upon the will of the contracting parties merely. But that which depends merely upon will is not a proper subject for a suit at law.

Roccus de Assecurat. n. 121.

* P. 234

Bynk. Quæst. Jur. Pub. l. 1. c. 21. sub fine.

If a ship, though neutral, be insured on a voyage prohibited by an embargo, laid on in time of war, by the prince of the country, in whose ports the ship happens to be, such an insurance also is void. This depends upon the power of an embargo, the right of laying on which by the sovereign of this country in time of war is undoubted; although in time of peace it may be a different question. The right being admitted, it follows of course, that any act done in contravention of a proclamation of this nature, is illegal and criminal; because it is equally binding as an act of parliament, and a contract founded on such illicit proceedings is consequently void.

1 Black. Com. 270.

Vide ante 79.

Delmada v. Motteux. B. R. Mich. 25 Geo. 3

This was determined in a very modern case, upon a special verdict. It was an action on a policy of insurance on the *Bella Juditta*, a *Venetian* ship, *at and from London to the Grenades, with liberty to touch at Cork and Madeira to load.* The defendant pleaded the general issue; and the cause came on to trial before Mr. Justice *Buller*, when the jury found a special verdict, the material facts in which were these. That the ship was a *Venetian* vessel, and the plaintiff a subject of the state of *Venice*; that in *October*, 1782, the ship sailed on her voyage from *London* to *Cork*, and there took in a loading of provisions,

* P. 235

* the property of *French* subjects, the enemies of the king of *Great Britain*. That the said ship, having taken in at *Cork* clearances and bills of lading for *Madeira*, an island belonging to the king of *Portugal*, sailed in *December*, 1782, from *Cork* to that

that iſland, at which ſhe was neither to unload any part of her cargo, nor to receive any goods on board, but where ſhe took clearances and bills of lading for the iſland of *St. Thomas*, belonging to *Denmark*, whither ſhe was not deſtined: that on her voyage from *Madeira* to *Grenada*, within 14 leagues of the latter, ſhe was captured by an *Engliſh* man of war as prize, and carried to *St. Lucia*: that when the ſhip ſailed from *London*, and from thence till after the capture, *Grenada* was in the poſſeſſion of the *French* king. The ſpecial verdict further finds, that his majeſty on the 18th day of *Auguſt*, 1780, laid an embargo upon all ſhips and veſſels laden or to be laden in the ports of the kingdom of *Ireland* with black cattle and hogs, beef, pork, butter and cheeſe, or any ſort of proviſions. It is alſo found, that after the capture, a ſuit was commenced in the Vice Admiralty Court of *Barbadoes*, againſt the ſaid ſhip and cargo, as belonging to the *French* king, or to ſome of his ſubjects; and the judge of that court did condemn the cargo as the property of the enemies of the king of *Great Britain*, which ſentence was appealed from, and is now depending: that the judge of the ſaid Court of Vice Admiralty was of opinion, that the ſaid ſhip *Bella Juditta* was the property of *Abram Delmada* the plaintiff, and ordered that the ſhip ſhould be reſtored; but he did not conceive the owner of the ſaid ſhip to be entitled to any freight, or damages occaſioned by the capture, becauſe ſhe was engaged in a wrong act, and the captor did no more than his duty: that the ſaid ſhip was accordingly reſtored.

Upon this verdict, the queſtion for the court to decide in point of law, was whether the inſurers upon the ſhip on this voyage were liable to pay for this loſs of freight, and the damages occaſioned by the capture.

Lord *Mansfield*.—Is this voyage not a breach of the embargo? The king in time of war has an undoubted right to lay an embargo: in time of peace it is another queſtion. Every power lays them on. If the ſhip had only been carrying goods * of an enemy on a voyage lawful for her to perform, ſhe might have been entitled to freight. But here the ſentence ſays, ſhe ſhall not. And why? becauſe ſhe has done a wrong thing. It is a fraud; for under colour of a neutral port, ſhe goes to an enemy's port. She breaks an embargo. What the conſequence of that is, has not as yet been ſettled: but to break an embargo is undoubtedly a criminal act; and whereever a man makes an illegal contract, this court will not lend him their aid. The defendant accordingly had judgment. * P. 236

Though an inſurance upon a ſmuggling voyage, prohibited by the revenue laws of this country, would be void under the principle above ſtated; yet the rule has never been ſuppoſed to extend to thoſe caſes, where ſhips have traded, or intend to trade,

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trade, contrary to the revenue laws of foreign countries, because no country takes notice of the revenue laws of another: in such cases, therefore, the policy is good and valid; and if a loss happen, the underwriter will be answerable.

Vide ante c. 10. p. 193.

Thus in the case of *Planche* against *Fletcher*, which was stated at large in a preceding chapter, one of the objections taken to the insurance was, that there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, although she was never designed to go to that place. But Lord *Mansfield* declared for himself and his brethren, that it was no fraud on the underwriters, perhaps on nobody. The reason for clearing for *Ostend*, and signing bills of lading, as from thence did not fully appear: but it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours, and it may be the interest of the farmers to connive at the importation of *English* commodities, and take *Ostend* duties rather than stop the trade, by exacting a tax, which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another.

In another case, a short time afterwards at *Guildhall*, Lord *Mansfield*, in his charge to the jury, advanced the same doctrine which had been established by the whole court in the preceding case.

* P. 237 Lever v. Fletcher. Lond. Sitt. Hil. Vac. 1780.

* It was an action on a policy of insurance at and from *London* to *Pensacola* and *Manshac* in the river *Mississippi*, with liberty to touch at *Portsmouth* and *Jamaica*. The ship insured, was employed in the usual trade in the river *Mississippi*, and traded at *Little Manshac*, on the island of *New Orleans*, part of the dominion of *Spain*. *Manshac*, the place mentioned in the policy, is part of the continent of *North America*, on that side of the river, which *France* and *Spain* by the treaty of *Paris* in 1763, surrendered to *Great Britain*, and is about 37 leagues higher up the river than *New Orleans*. The loss happened by a seizure of the ship at *Little Manshac* by the *Spanish* governor, as a reprisal for transgressions alledged to have been committed by a king's ship in the *Lakes*. The counsel for the defendant contended, that the policy in question was on a trading voyage, and that the trade itself was an illicit one.

Lord *Mansfield*.—The first question is, whether this policy covers the trading on the *Mississippi* before the ship's arrival at *Manshac*. The trading at *Little Manshac* is a delay of the voyage, and an increase of the risk. If the policy do not cover this part of the trading, then it is a deviation, and there is an end of the contract, at least, so as to prevent the plaintiff from recovering. It is very clear what the trade is. Every trading with the subjects of *Spain* is illicit by the treaty of *Paris*. The

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Navigation is free to both countries; and the municipal laws of both countries remain. *Though ſuch trading be contrary to the laws of* Spain; *yet no country pays attention to the revenue laws of another. Therefore, if the defendant had, with full knowledge that it was a ſmuggling trade with* Spain, *made the inſurance, then it might be a fair contract between the parties.* But the main queſtion for conſideration ſeems to be, whether this trading at *Little Manſhae* was inſured by the policy. The jury found for the defendant: and it may be preſumed on the ground of deviation.

It cannot be improper, becauſe it is nearly connected with the ſubject before us, to enter upon the enquiry, how far trading with an enemy, in time of actual war, is legal? The opinion of foreign writers upon this point, although the judicial ſentiments of this country do not ſeem to coincide with them, cannot fail to afford information upon the queſtion. It has long * been ſettled in *France*, that all trading with enemies is illegal. This indeed is given as the reaſon for requiring to be inſerted in the policy of inſurance, the name and place of abode of the inſured, the effects upon which the inſurance is made, the name of the ſhip, and the place of loading and unloading. By complying with ſuch a requiſition, it is known in time of war, whether, notwithſtanding the prohibition of commerce, which, according to theſe writers, a declaration of war always imports, the ſubjects of the king continue to trade with the enemies of the ſtate, or with their friends and allies: by which means they would be able to convey warlike ſtores, proviſions, and other prohibited goods to the enemy. But every thing of this kind being forbidden, as prejudicial to the ſtate, would be liable to confiſcation, and to be condemned as prize, whether found in ſhips of our country, or of friends and allies. The prohibition to inſure the property of an enemy, which is almoſt generally eſtabliſhed by the ordinances of foreign countries, proceeds upon the principle, that it is unlawful to trade with an enemy; becauſe if commerce were allowed to be carried on between the hoſtile nations, there could not poſſibly be an objection to protect that commerce by means of the contract of inſurance.

Guid. c. 2. ſ. 2. 3. 2 Val. 31. * P. 238

Ord. of Stockholm, &c. 2. Mag 257.

The general law of *England* has not, that I have been able to find, laid down any expreſs rule upon the ſubject; and therefore we muſt merely take notice of what has paſſed in the courts of juſtice, although the queſtion does by no means ſeem to be determined: an obſervation which fell from Lord *Mansfield*, as late as the year 1786. The only caſes to be found in the books upon the ſubject are two; the one is in *Roll's* Abridgment, and happened in the 13th year of the reign of *Edward* the Second. A licenſe granted to certain merchants to buy and ſell in *Scotland*, which was then at war with the king of *England*, was declared to be void; and conſequently the trading

2 Roll. Abr. 173.

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trading held to be illegal. The other was a caſe put to the judges, in the time of Lord *Somers*, for their opinion, upon the point, whether ſending corn to the enemy, in time of war and famine, was a crime at the common law. The judges held it was a miſdemeſnor. It is to be obſerved, however, that the laſt was a caſe where proviſions were ſupplied, which, as well as warlike ſtores, muſt be prohibited from the nature of the thing.

1 Term. Rep. Hil. 1786. p. 85.

* P. 239 1 Vezey 317. Vide ante. p. 1.

* The firſt modern caſe, in which trading with an enemy came at all under conſideration; although it did not then meet with any deciſion, was that of *Henkle* againſt the *Royal Exchange* Aſſurance Company, before Lord *Hardwicke* in the court of Chancery, which upon a former occaſion was cited much at length. His lordſhip there ſaid; it might be going too far to ſay that all trading with enemies is unlawful: for that general doctrine would go a great way, even where only *Engliſh* goods are exported, and none of the enemy's imported, which might be very beneficial. He was not ſatisfied with the anſwer given to the objection of an illicit trade, by citing the caſe of the *South Sea* Company: for that by no means determined the queſtion. That was not a trading contrary to the law of this country; but contrary to the agreement of the company: which is different from a contract repugnant to the general law of the country, whether ſtatute, common, or maritime law. The ſame anſwer might be given to Sir *Robert Nightingale's* caſe, which was merely a plea in the Exchequer, upon the private right of the company, being contrary only to their ſtatutes, and not to the general law of the land.

Giſt v. Maſon. 1 Term. Rep. 84.

From this opinion, it is evident that the queſtion was by no means ſettled in Lord *Hardwicke's* mind: but in a ſubſequent caſe, Lord *Mansfield* adds an argument, which, though not concluſive, moſt aſſuredly goes a great way to ſhew that trading with an enemy is not forbidden by the general law of the country; for he ſays, that ſeveral acts of parliament have been *ſpecially* paſſed, in order to make ſuch trading illegal, which proves that the legiſlature did not think it was ſo before. The ſhip, in the laſt of theſe caſes to be ſure, appeared to be neutral; and the court laid it down, that it had no where been held that an inſurance upon a neutral ſhip trading to an enemy's port was void. But then Lord *Mansfield* went upon the doctrine of a ſubject's trading with enemies, and concluded thus: by the maritime law, trading with an enemy is cauſe of confiſcation, provided you take him in the act; but this does not extend to neutral veſſels. Thus the queſtion ſtands at preſent in the law of *England*; and there I ſhall leave it, till ſome judicial or

* "of the maſter, and three fourths of the mariners are *Engliſh*

legiſlative opinion is given upon the point: for when ſuch men as Lord *Mansfield*, Lord *Hardwicke*, and the other learned judge

* vide p. 251 - 2d line from bottom -

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* ges of the court of King's Bench, have doubted upon the subject, who shall venture to hazard an opinion?

The next question which comes to be considered is whether it be *lawful to insure* the property of an enemy. (*a*) Foreign writers are of opinion, that it is not; and although it has been a considerable question, much agitated, how far the allowance of such contracts is *expedient*; yet the insurance of enemy's property does not contravene any positive law known at this day in *England*. * P. 240

In the first chapter of this work, we had occasion to mention this question; and in addition to what was then offered, (for I do not mean to give an absolute opinion upon the expediency) I shall only mention, that in those countries where commerce with an enemy is forbidden, it follows as a consequence, that the insurance of the property of an enemy, must also be prohibited; because to insure the effects of an enemy, or to send them directly or indirectly, is in truth the same thing. A very learned foreigner, to whose writings mankind are much indebted, argues strongly against the expediency of such a measure; and certainly his arguments have great weight. If, says he, you take upon yourselves the risks and perils, to which your enemies are exposed, what is it but to promote their maritime commerce? for insurances have been invented, that a great advantage at a small risk might be given to external trade. Hence the laws of all the countries which prohibit such contracts, proceed upon the justest grounds, because by a declaration of war, every one is ordered to annoy an enemy, as much as possible. If this be so, he is also forbidden to consult the advantage of the enemy by any means whatsoever. But if it be said, that by such insurances, the underwriter gains more than he loses, and consequently the advantage is greater on our side than that of the enemy, it may be answered, that that is an assertion of a very doubtful nature, and of which experience itself hardly enables us to form an opinion; whilst on the other hand, it is certain, that we afford * our enemies very great opportunities of encreasing their commerce: which, as it is useful to our enemies, and may turn to our own destruction, ought to be wholly suppressed. In conformity to these principles, which have been adopted by most of the commercial states in *Europe*, every species of insurance upon the property of any enemy has been absolutely forbidden; and * P. 241

Vide ante p. 13.

2 Val. 32.

Bynk. Quæst. Jur. Pub. l. 1. c. 21.

(*a*) In the first edition I had stated it to be my own opinion, that such insurances were lawful: but as I know that some high and respectable characters in the profession entertain doubts upon the subject, I prefer stating the arguments that may be urged on both sides of the question, and forbear at present to draw any conclusion.

such

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ſuch has been the law of *France*, at leaſt, ever ſince the year 1660; although I believe, during the war of 1756, inſurances were made in *France* upon *Engliſh* property, by means of fictitious perſons, as truſtees for the perſon really intereſted in the property.

Le Guidon c. 2. art. 5. 1 D'Emerig c. 4. ſ. 9.

However cogent theſe arguments may appear, they certainly are not concluſive, nor are they congenial to that ſpirit of univerſal and extenſive commerce, which ſo ſtrongly marks the *Britiſh* character. Thoſe, who argue in favour of ſuch inſurances, have contended, that it would be of very dangerous conſequence, by a prohibition of the nature alluded to, to ſtrip ourſelves of a branch of trade, which we now enjoy almoſt without a rival; as more of this buſineſs is done in *England* than in all the reſt of *Europe*. That not only the nations with whom we are at peace, but even the *French* and *Spaniards*, when at war, tranſact their buſineſs of inſurance in *London*; and that it never can be imputed to our merchants as a crime to correſpond with the enemy upon ſuch a ſubject: that to carry on trade for the mutual benefit of both the hoſtile countries, is not aſſiſting the enemy; nor is it ſuch a correſpondence as the declaration of war intends to prohibit, eſpecially as the nature of the trade is ſuch, as always to leave a large balance of ready money in our favour. That although this balance, when compared with the general national expences of carrying on a war, may appear to be but trifling; yet the greater thoſe expences are, the more money we are obliged to ſend out on that account: and ſurely we ought to be cautious of parting with any branch of trade, which turns the balance to *England*. Beſides this, when the great profits made by the inſurer are fully conſidered, the profits made by the broker or office keeper, the profits of the factor, and the dealer in Exchange, the balance is by no means of ſo trifling a nature. It has been further urged, that the *French* are naturally of an enterprizing and adventurous diſpoſition, and will, as ſoon as they are prevented from
* P. 242 * inſuring here, open public offices, and multitudes of rich men will there undertake the buſineſs; becauſe after we have baniſhed them from our market, they will reſort to offices of their own, rather than to thoſe of any other foreign country. But that while no ſuch prohibition takes place, no private inſurer can in *France* meet with encouragement in this line; nor will it be in the power even of the government of *France* to erect an office for the purpoſe of inſurance; becauſe their merchants have met with ſuch hounourable, and fair treatment from the inſurers here, and experience ſo much equity, juſtice and diſpach in our courts of law, that as long as they are permitted, they would rather pay commiſſion for inſuring here, than apply to the inſurers of their own, or any other country. In addition to which, it is a notorious fact, that important intelligence has,

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by means of ſuch inſurances, been frequently obtained of the enemy's deſigns; and that in ſeveral wars, ſome of the richeſt prizes have fallen into our hands by information communicated to thoſe employed to procure inſurances upon them.

Such is the ſum of the arguments on both ſides of this important queſtion; and although the reaſons in favour of ſuch inſurances are thoſe, which ſeem in general to have had moſt ſway in this country; yet at one time, the contrary principles gained the aſcendant. For in the year 1747, a bill was introduced into the Houſe of Commons to prohibit inſurances upon the ſhips and goods of the ſubjects of the king of *France*; and although it was vigorouſly oppoſed by Sir *Dudley Ryder*, and the honourable Mr. *Murray*, the then Attorney and Solicitor General, upon the principles already ſtated; yet for ſome political reaſons, it was afterwards carried into a law. The duration of that act, however, being limited by the exiſtence of the *French* war then carrying on, it expired in about a year after it was paſſed. No attempt has been made to introduce it in any ſubſequent war, which in ſome meaſure ſerves to ſhew, either that the inconveniences of it were felt, during its ſhort exiſtence; or that the arguments advanced againſt ſuch a bill have convinced the legiſlature of the impropriety of prohibiting ſo valuable a branch of trade.

Debates in the Houſe of Commons, vol. I. p. 117.

21 Geo. 2. c. 4.

From what has been ſaid then it appears, that whether the meaſure be politick or not; ſuch inſurances are not forbidden by any poſitive law exiſting at this day. Before this point is * concluded, it will be proper to mention, that Lord *Hardwicke* ſeems inclined to the opinion delivered in the Houſe of Commons by Sir *Dudley Ryder* and Mr. *Murray*; for in the caſe already alluded to in this chapter, his lordſhip ſays: there has been no determination, that inſurances on enemies ſhips during the war is unlawful; and there have been ſeveral inſurances of this ſort, during the war, which a determination upon the legality of trading with an enemy might hurt. In addition to this, it may be obſerved, that Lord *Manſfield*, in the courſe of his long experience as Chief Juſtice of this country, has never found reaſon to alter theſe ſentiments which he entertained, when he ſpoke in the Houſe of Commons againſt the bill introduced in the year 1747. For his lordſhip has frequently ſince in parliament, and upon the bench, declared his approbation of theſe inſurances: and ſo late as the year 1786, in the courſe of an opinion delivered at *niſi prius* he ſaid, "It is for the benefit "of this country to permit theſe contracts upon two accounts: "the one becauſe you hold the box, and are ſure of getting the "premiums at leaſt, as a certain profit; the other, becauſe it "is a certain mode of obtaining intelligence of the enemy's de- "ſigns, and I have known inſtances of intelligence procured by "ſuch methods." Notwithſtanding this liberality of ſentiment, however, which prevails in the *Engliſh* nation, there is one ſpe-

* P. 243

1 Vezey 319.

Gift v. Maſon. 1 Term. Rep. 84. and MS. note of ſame caſe.

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cies of insurance, which cannotbe made upon the ships or goods of an enemy, or even of a subject, and that is upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, other warlike stores, or provisions: because from the nature of these commodities, they are absolutely prohibited by the laws of all nations.

Having thus disposed of these two important questions, and shewn, that however impolitick the measure may be, general trading with an enemy for the mutual benefit of both countries, seems by no means to have been declared to be contrary to law; and that insurances of enemy's property are not prohibited by any act of the legislature: it will be proper to conclude by stating what the principle is, which is laid down in this chapter, and supported by authority. All insurances upon a voyage generally prohibited, such as to an enemy's garrison, or upon a voyage directly contrary to an express act of parliament, or to royal proclamation in time of war, are absolutely null and void.

*P. 244 *CHAPTER THE THIRTEENTH

Of Prohibited Goods.

THE subject of the present chapter is materially connected with that of the foregoing; and indeed follows as a consequence from the doctrine there advanced. We then saw that a contract founded upon that which was contrary to law, could never be carried into effect. Thus by the laws of almost all countries, the exportation and importation of certain commodities are declared to be illegal: to act contrary to that prohibition is clearly a contempt of legal authority: and consequently a moral wrong. If the act itself be illegal, the insurance to protect such an act must also be contrary to law; and therefore void. Agreeably to this principle, it seems to have been laid down by the writers upon the subject, as a general and universal proposition, that an insurance being made, although in general terms, does not comprehend prohibited goods; and therefore when the insured shall procure such commodities to be shipped, *the underwriter being ignorant of it*, by means of which the ship and cargo are confiscated, the insurer is discharged. In this passage from *Roccus* it may be inferred, that if the underwriter *knew* that the goods were prohibited, the insurance would be valid. But we trust, it was sufficiently shewn in the preceding chapter, that that will not alter the case: because no consent or agreement can render a contract good and valid, which upon the face of it, is contrary to law.

Lord Kaims's Prin. of Eq. 66.

Roccus de Assecur. No. 21.

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In *France* this rule was adopted ſo long ago as the year 1660: for in the work of a very reſpectable writer of that age we find this paſſage: *aſſeurances ſe peuvent faire ſur toute ſorte de merchandize, pourvu que le tranſport ne ſoit pas prohibé par les edicts et ordonnances du roy.* And from an authority no leſs reſpectable, it appears that the law of *France* has undergone no alteration ſince that period; for he ſays, "that thoſe effects "the importation or exportation of which is prohibited in "* *France*, cannot be the ſubject matter of the contract of in- "ſurance, and if they ſhould be confiſcated, the inſurers are "not reſponſible, *even where the truth has been declared by a* "*ſpecial clauſe in the policy.* The aſſurance is void, and no premium is due." This paſſage from the celebrated work juſt referred to, confirms the idea above ſtarted, with reſpect to the knowledge of the underwriter.

Le Guidon. c. 2. art. 2. Emerigon Traite des Aſſurances tom. 1. c. 8. ſ. 5.

* P. 245

The law of *England*, whoſe commercial regulations have ſurpaſſed thoſe of every other nation in the world, has alſo introduced ſuch a rule into its ſyſtem of mercantile juriſprudence: and the oldeſt writers upon the ſubject have taken notice of it. It is ſaid, "if prohibited goods are laden aboard, and "the merchant inſures upon the general policy, it is a queſ- "tion whether if ſuch goods be lawfully ſeized as prohibited "goods, the inſurers ought to anſwer. It is conceived they "ought not: for if the goods are at the time of the lading "unlawful, and the lader knew of the ſame, ſuch aſſurance "will not oblige the inſurer to anſwer the loſs; for the "ſame is not ſuch an aſſurance as the law ſupports, but a frau- "dulent one."

Molloy, lib. 2. c. 7. ſ. 15.

But it is not upon the opinions of learned men merely, that this doctrine is founded in the *Engliſh* law; for the legiſlature have by poſitive ſtatutes declared their idea upon the ſubject. It appears from the preamble to that ſection of the ſtatute about to be quoted, that a cuſtom, highly prejudicial to the revenue of the country had prevailed, and was encreaſing to a very alarming degree, of importing great quantities of goods from foreign ſtates in a fraudulent and clandeſtine manner, without paying the cuſtoms and duties payable to the crown: and that this evil had been encouraged and promoted by ſome ill deſigning men, who in deſiance of the laws, had undertaken as inſurers, or otherwiſe, to deliver ſuch goods ſo clandeſtinely imported, at their charge and hazard, into the houſes, ware- houſes, or poſſeſſion of the owners of ſuch goods. In order to (*a*) remedy this miſchief, it was enacted, "that all and every "perſon and perſons, who, by way of inſurance or otherwiſe, "ſhould undertake or agree to deliver any goods, wares, or "merchandizes whatſoever, to be imported from parts beyond "the ſeas, at any port or place whatſoever within this king- "dom of *England*, dominion of *Wales*, or town of *Berwick*

(*a*) 4 and 5. W. and M. c. 15. ſ. 14. 15. 16. ſecl. penalty on perſons inſuring to import prohibited goods

* P. 246

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" *upon Tweed*, without paying the duties and cuſtoms that " ſhould be due and payable for the ſame at ſuch importation, " *or any prohibited goods whatſoever*; or in purſuance of ſuch " inſurance, undertaking or agreement, ſhould deliver, or cauſe " or procure to be delivered, any prohibited goods, or ſhould " deliver, or cauſe or procure to be delivered, any goods or mer- " chandizes whatſoever, without paying ſuch duties and cuſtoms " as aforeſaid' knowing thereof, and all and every their aiders, " abettors, and aſſiſtants, ſhould for every ſuch offence forfeit " and loſe the ſum of *five hundred pounds*, over and above all " other forfeitures and penalties, to which they are liable by " any act already in force." It was alſo enacted, " that all " and every perſon and perſons, who ſhould agree to pay any " ſum or ſums of money for the inſuring or conveying any " goods or merchandizes that ſhould be ſo imported, without " paying the cuſtoms and duties due and payable at the im- " portation thereof, or of any prohibited goods whatſoever, or " ſhould receive or take ſuch prohibited goods into his or their " houſe, or warehouſe, or other place on land, or ſuch other " goods, before ſuch cuſtoms or duties were paid, knowing " thereof, ſhould alſo for every ſuch offence forfeit and loſe " the like ſum of five hundred pounds; the one half of the " ſaid forfeitures to be to their majeſties, and the other half to " the informer, or to ſuch perſons as ſhould ſue for the ſame. " And if the inſurer, conveyor, or manager of ſuch fraud " ſhould be the diſcoverer of the ſame, he ſhould not only " keep the inſurance money or reward given him, and be diſ- " charged of the penalties to which he was liable by reaſon of " ſuch offence, but ſhould alſo have to his own uſe one half " of the forfeitures hereby impoſed upon the party or parties " making ſuch inſurance or agreement, or receiving the goods " as aforeſaid: and in caſe no diſcovery ſhould be made by " the inſurer, conveyor, or manager as aforeſaid, and the " party or parties inſured or concerned in ſuch agreement " ſhould make diſcovery thereof, he ſhould recover and receive " back ſuch inſurance money or premium as he had paid " upon ſuch inſurance or agreement, and ſhould have to his " own uſe one moiety of the forfeitures impoſed upon ſuch " inſurer, conveyor, or manager as aforeſaid, and ſhould alſo " * be diſcharged of the forfeitures hereby impoſed upon him " or them."

Sect. 15. Like penalty on the inſured.

* P. 247

A few years afterwards, luſtrings, the manufacture of which till then was little known in *England*, having been worked to great perfection by the Royal Luſtring Company, the legiſlature found it neceſſary to protect this branch of trade, by prohibiting the importation of ſuch ſilks from foreign countries into this, without paying the duties, whether by direct means,

or

or by the way of insurance. It was enacted, "that every "person, who should import any foreign alamodes or lustrings "from parts beyond the seas, into any port or place within "the kingdom of *England*, dominion of *Wales*, *&c.* without "paying the rates, customs, impositions, and duties that "should be due and payable for the same at such importation, "or should import any alamodes or lustrings, prohibited by "law to be imported, or should, by way of insurance or "otherwise, undertake or agree to deliver, or in pursuance "of any undertaking, agreement, or insurance, should deliver, "or cause to be delivered, any such goods or merchandize, "and every person who should agree to pay any sum or sums "of money, premium, or reward for insuring or conveying "any such goods or merchandize, or should knowingly take, "or receive the same into his, her, or their house, shop or "warehouse, custody or possession, such person or persons "should and might be prosecuted for any of the offences or "matters aforesaid, in any action, suit, or information; and "thereupon a *capias* in the first process, specifying the sum of "the penalties sued for, should and might issue, and such "person or persons should be obliged to give sufficient bail "and security by natural born subjects, persons naturalized "or denizens to the officer executing the writ, to appear in "court to answer such suit, and at such appearance to give "sufficient bail to answer and pay all the forfeitures and penal-"ties incurred for such offence, or to yield his, her, or their "bodies to prison." 8 and 9 W. 3. c. 36. s. 1.

The second section of this statute enables persons to sue for the penalties imposed by the former act of *William* and *Mary* by action of debt, bill, plaint, or information, in any of his majesty's courts of record at *Westminster*. Sect 2.

* Wool being the staple manufacture of this kingdom, it was always deemed a heinous offence to transport it out of the realm: for we find it was forbidden at the common law; and afterwards more expressly in the reign of *Edward* the Third, since which period this branch of trade has been much attended to, and any offences against it have met with corporeal and pecuniary punishments by several subsequent statutes. This being the case, an insurance upon wool so to be exported must have been void; because the very foundation of the contract was contrary to law. But notwithstanding these restrictions, the practice of exporting wool became so frequent, as well as the practice of insuring such cargoes, and undertaking to deliver them safely abroad, that it became necessary for the legislature to interpose, and by a new declaration of the law, and the imposition of a heavy penalty, to endeavour to check the growing evil. Accordingly it was enacted, "that every person, who, by way of insurance or other-"wise, should undertake or agree, that any wool, wool-fells, * P. 248 Mir. c. 1. s. 3. 11 Ed. 3. c. 1. 8 Eliz. c. 3. 12 Car. 2. c. 32. 7. and 8 W. 3. c. 28. 4 G. 1. c. 11, 12 Geo. 2. c. 21. s. 29.

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"wool-flocks, mortlings, ſhortlings, worſted, &c. ſhould be "carried or conveyed to any parts beyond the ſeas from any "port or place whatſoever within this kingdom of *Ireland*: or "in purſuance of ſuch inſurance, undertaking, or agreement, "ſhould deliver, or cauſe to be delivered, any of the ſaid goods "in parts beyond the ſeas, ſuch perſon, and all and every his aid-"ers, &c. ſhould for every ſuch offence forfeit and loſe the ſum (a)of five hundred pounds." The next ſection inflicts a like penalty on the inſured: (b)and the following one, in order to encourage the parties to diſcloſe ſuch contracts, releaſes the party informing from all the penalties, to which he himſelf was ſubject, and alſo gives him the whole of the forfeiture, after deducting the charges of the proſecution.

500l. penalty on the inſurer who inſures or procures wool to be landed in foreign parts.

(a) Sect. 30.

(b) Sect. 31.

But in order wholly to prevent this illicit exportation of wool, it was neceſſary for the legiſlature to go one ſtep further: becauſe as policies are frequently made on goods, as well as on ſhips, in which the inſurer undertakes, in conſideration of the premium, to bear all the riſks and hazards of the voyage; and as it is generally unknown to the inſurers what ſorts of goods are loaded on board any ſhip or veſſel, it happened that inſurances were made on wool or woollen yarn to be carried from *Great Britain* or *Ireland* to foreign ports, or on woollen manufactures to be carried from *Ireland*. Therefore it was declared, "that *"all policies of inſurance, which ſhould be made on goods and merchandizes, loaden or to be loaden, on any ſhip or veſ-"ſel bound from *Great Britain* or *Ireland* to foreign parts be-"yond the ſeas, which ſhould afterwards appear to be wool or "woollen yarn, or any other ſpecies of wool, or woollen manu-"factures from *Ireland*; and all policies of inſurance which "ſhould be made on any ſhip or veſſel bound from *Great Bri-"tain* or *Ireland* to foreign parts beyond the ſeas, which ſhould "have on board any wool or woollen yarn, or any other ſpecies "of wool or woollen manufactures from *Ireland*, ſhould be "deemed and taken to be null and void, notwithſtanding any "words or agreement whatſoever, which ſhould be inſerted in "any ſuch policy of inſurance; and nothing ſhould be recover-"ed by the aſſured in either caſe for loſs or damage, or for the "premium which ſhould have been given as the conſideration "for inſuring ſuch goods and merchandizes, ſhip or veſſel."

* P. 249

Same act. ſ. 33. Inſurances on woollen goods void.

This latter act, as far as relates to *Ireland*, has been repealed by a ſubſequent ſtatute of 20 *Geo.* 3. *c.* 6.

In a late ſeſſion of parliament an act paſſed for reducing all the laws relative to the exportation of wool into one ſtatute; and for the firſt offence of that ſort inflicts a penalty of 50*l.* with ſix months ſolitary impriſonment for exporting wool, &c. The 45th ſection of that ſtatute declares that, "every perſon or "perſons who, by way of inſurance or otherwiſe, ſhall under-"take or agree that any ſheep, wool, or any other of the enu-

28 Geo. 3 ch. 38.

Sect. 45.

"merated

" merated articles in the ſtatute, ſhall be carried or conveyed " to any parts beyond the ſeas, from any port or place whatſo- " ever within this kingdom, or in purſuance of ſuch undertaking " or agreement, ſhall deliver, or cauſe or procure to be " delivered any ſheep, wool, *&c.* in parts beyond the ſeas, ſuch " perſon or perſons, their aiders and abettors, ſhall upon convic, " tion be liable to the ſame puniſhment as the exporters."

The next ſection inflicts a like penalty upon the perſons paying for ſuch inſurance. Sect. 46.

But as inſurances are frequently made on goods, the inſurer not knowing what the goods are, it is declared that " all po- " * licies of inſurance which ſhall be made on goods and mer- " chandizes, laden or to be laden on any ſhip or veſſel bound " from *Great Britain* to foreign parts, which ſhall afterwards " appear to be wool, woollen, or worſted yarn, *&c.* ſhall be " deemed and taken to be null and void, notwithſtanding any " words or agreement whatſoever, which ſhall be inſerted in " ſuch policy of inſurance, and nothing ſhall be recovered by " the aſſured from the inſurer for loſs or damage, or for the pre- " mium which ſhall have been given as the conſideration for " ſuch inſurance." Sect. 48. * P. 250

From an attentive review of theſe ſtatutes, the idea of the *Britiſh* parliament may be clearly and decidedly collected; and the ſtatutes juſt referred to, are the moſt general in their import that could be found upon the ſubject; and conſequently the moſt proper to be mentioned here.

The queſtion naturally occurs, what goods come under the deſcription of prohibited goods, ſo as to render an inſurance upon them void. To mention by name all the different kinds of merchandize, which fall under that deſcription, would be tedious; and, as it ſhould ſeem, wholly unneceſſary. Thus much may be laid down as a general propoſition, that all inſurances upon goods, forbidden to be exported or imported, by poſitive ſtatutes, or by the king's proclamation *in time of war*; or which, from the nature of the commodity, and by the laws of nations, muſt neceſſarily be contraband, are abſolutely null and void. Under the firſt diviſion may be ranked all offences againſt the revenue laws of this country; and therefore if an inſurance were made in order to protect ſmuggled goods, ſuch inſurance would doubtleſs be of no effect. To this head alſo may be referred any breach of the navigation acts, which were eſtabliſhed for the protection, encouragement, and advancement of our commercial and naval intereſts; and which have produced thoſe effects to the wonderful extenſion of our commerce, and the aggrandizement of the nation. At a very early period of the hiſtory of this country, ſeveral wiſe proviſions were made by parliament, ſolely with this view: but on account of the low ſtate of commerce in thoſe ages, which was 5 Rich. c. 3.

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the more depreſſed, by the warlike ſpirit of the nation, and the inteſtine commotions that agitated and diſturbed the ſtate, thoſe * proviſions in ſome meaſure failed of their effect. But the moſt beneficial ſtatute for the trade and commerce of *England* is the famous navigation act, which paſſed ſoon after the reſtoration of *Charles* the ſecond; the outlines of which were firſt framed, in the time of the commonwealth, by *Oliver Cromwell*.

* P. 251

Scobel 132. By the reports of hiſtorians, we do not find that he framed it with any view to thoſe beneficial effects, which ſprung from it, but with a partial and confined intention, being deſigned by him to mortify our own ſugar iſlands, which were diſaffected to the parliament, and held out for the king, by ſtopping the lucrative trade, which they then held with the *Dutch*. Another motive for his conduct was this, that as the *Dutch* were at that time riſing into opulence and wealth, and had given him diſguſt; and as their commerce did not conſiſt ſo much in the produce of their own country (which afforded but few commodities) as in being the general carriers and factors of *Europe*, he had it in his power to affect their trade in a conſiderable degree, by prohibiting all nations from importing into *England* in their own bottoms any commodity, which was not the growth and manufacture of their own country. At the reſtoration, however, thoſe plans, the good effects of which had probably been experienced, were adopted by the legal and real conſtitution of the country; and were conſiderably improved by inſerting clauſes, which had been overlooked and omitted in the original deſign, or which time and experience had pointed out as neceſſary to the completion of that ſyſtem, the beneficial effects of which are at this day moſt ſenſibly felt. It is not wholly impertinent in a work like the preſent to ſtate briefly the outlines of a ſtatute, ſo conſiderably affecting the commercial intereſts of the nation, and which has ſerved as the groundwork of all ſubſequent laws for the good management of *Britiſh* navigation.

7 Hume's hiſt of Eng. 211.

12 Car. 2. c. 18. ſ. 3. The firſt ſection of the act declares, "that no goods ſhall be "imported into, or exported out of, any plantations or territories "to his majeſty belonging in *Aſia*, *Africa*, or *America*, but in "ſuch ſhips only as belong to the people of *England*, or *Ireland*, "*Wales* or *Berwick*, or are of the built of, and belonging to, any "of the ſaid territories, as the proprietors thereof, and where- "of the maſter, and three fourths of the mariners are *Engliſh*, "(which word by a ſubſequent ſtatute, 13 and 14 *Car.* 2. ch. "* 11. ſ. 6. was explained to mean his majeſty's ſubjects of *Eng-* "*land*, *Ireland*, and his plantations generally) under penalty "of the forfeiture of all the goods and commodities which ſhall "be imported into, or exported out of, any of the ſaid places, "in any other ſhip or veſſel, as alſo of the ſhip and veſſel."

Sect. 3 "It is alſo declared, "that no goods of the growth, manufacture "or production of *Africa*, *Aſia*, or *America*, be imported into "*Eng-*

" *England*, *Ireland*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*, in any " other ſhips than ſuch as belong to the people of *England*, *Ire-* " *land*, *Wales*, or *Berwick*, or of the plantations to his majeſty " belonging, as the proprietors thereof, and whereof the maſter " and three fourths of the mariners are *Engliſh*, under the penal- " ty of the forfeiture of all ſuch goods, and of the ſhip."

See an act of 2 W. and M. ſ. 1. c. 9. prohibiting the importation of thrown ſilk.

(a) "No goods of foreign growth, production, or manufacture, " which are to be brought into *England*, *Ireland*, *Wales*, *Guern-* " *ſey*, *Jerſey*, or *Berwick*, in *Engliſh* built ſhipping, or other ſhip- " ping belonging to ſome of the aforeſaid places, and navigated " by *Engliſh* mariners as aforeſaid, ſhall be brought from any o- " ther places but thoſe of the growth or manufacture, or from " thoſe ports where the goods are firſt uſually ſhipped for tranſ- " portation, under the penalty of the forfeiture of all ſuch goods, " as ſhall be imported from any other place, as alſo of the " ſaid ſhip."

(a) Sect 4. This ſection was altered as to the importation of American drugs by 7. Anne, c. 8. ſ. 12.

" It ſhall not be lawful to load in any ſhips, whereof any Sect. 6. " ſtranger or ſtrangers, born (unleſs ſuch as be denizens, or na- " turalized) be owners, part owners, or maſter, whereof three- " fourths of the mariners at leaſt ſhall not be *Engliſh*, any fiſh, " victuals, goods and merchandizes from one port or creek of " *England*, *Ireland*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*, to " another port or creek of the ſame, under penalty and forfei- " ture of all ſuch goods, together with the ſhip or veſſel."

" Where any privilege is given by the book of rates to goods Sect. 7. " or commodities exported or imported in *Engliſh* built ſhip- " ping, that is to ſay, ſhipping built in *England*, *Ireland*, *Wales*, " *Guernſey*, *Jerſey*, *Berwick*, or in any of the lands, dominions " and territories belonging to his majeſty, in *Africa*, *Aſia*, or " *America*, that it always is to be underſtood, that the maſter " and three-fourths of the mariners be *Engliſh*; and where it " is required that the maſter and three-fourths of the mariners " * be *Engliſh*, the true intent thereof is, that they ſhould con- * P. 253 " tinue ſuch during the whole voyage, unleſs in caſe of ſickneſs, " death, or being taken priſoners in the voyage, to be proved " by the oath of the maſter or chief officer of the ſhip."

The eighth ſection prohibits the importation of goods of the growth of *Muſcovy*, *Ruſſia*, or the *Ottoman* or *Turkiſh* empire, into *England*, except in *Engliſh* built ſhips, whereof the maſter and three-fourths of the mariners muſt alſo be *Engliſh*, under the penalty of forfeiting both ſhip and goods. Sect. 8.

And for preventing the practice of *colouring* aliens goods, the ninth ſection declares, that all wines of the growth of *France* or *Germany* imported in any other than *Engliſh* veſſels, ſhall be deemed aliens goods, and pay all ſtrangers cuſtoms, and duties: which proviſion is extended to certain commodities, named in the act, of the growth of *Spain*, the *Canaries*, *Madeira*, *Portugal*, or the Weſtern Iſlands, and of *Muſcovy*, *Ruſſia*, and *Turkey*. Sect. 9. Upon this ſect. ſee 13 and 14. Car. 2. c. 11. ſ. 23. 6 Geo. 1. c. 15. ſ. 1

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Turkey. It was alſo ordained by the next ſubſequent ſection of the ſtatute, in order to prevent the colouring or buying of foreign ſhips, that no foreign ſhip ſhould paſs as a ſhip to *England*, *Ireland*, *Wales*, or *Berwick*, until thoſe claiming the ſaid ſhip ſhould make appear to the chief officer of the cuſtoms that they were not aliens, and ſhould have taken an oath, that ſuch ſhip was *bonâ fide*, and without fraud by them bought for a valuable conſideration, expreſſing the ſum, and alſo the time, place and perſons, from whom it was bought, and who were the part owners: upon which oath that they ſhould receive a certificate, whereby ſuch ſhip ſhould in future paſs, and be deemed a ſhip belonging to the ſaid port, where the oath was ſo taken, and receive the privileges of ſuch ſhip. The officers of the cuſtoms are not to allow any privileges to any foreign built ſhip, until certificate granted, or proof of thoſe things required by this act. By the 13th ſection it is provided, that this act is not intended to reſtrain the importation of any *Eaſt India* commodities, loaden in *Engliſh* built ſhipping, whereof the maſter and three fourths of the mariners are *Engliſh*, from the uſual place of loading in thoſe ſeas, to the ſouthward and Eaſtward of the *Cape of Good Hope*, although the ſaid ports be not the very places of their growth. There is alſo a proviſion in favour of goods imported from *Spain*, *Portugal*, the *Azores*, * *Madeira* or *Canary* iſlands; and concerning goods and commodities from *Scotland*, and ſeal oil from *Ruſſia*. The 17th ſection impoſes a duty upon every *French* ſhip coming into *England*. And it was laſtly enacted, that the ſhips of *England*, *Ireland*, *Wales*, or *Berwick* ſailing to any *Engliſh* plantations in *Aſia*, *Africa*, or *America*, ſhould be bound in ſufficient ſureties, in proportion to the burthen of the ſhip, to bring the goods loaded at ſuch plantations into *England*.

Sect. 10.

Sect. 11. V. 6. Anne. c. 37. ſ. 21.

Sect. 13.

Sect. 14. and 16.

* P. 254

Sect. 17.

Such were the proviſions of this famous ſtatute, framed by the wiſdom of our anceſtors for the promotion of our naval and maritime ſtrength: upon this ſtatute have all ſubſequent commercial regulations been eſtabliſhed; and from this ſource they have derived ſolidity and ſtrength. But in vain have ſuch rules been framed, if inſurances upon the importation or exportation of the commodities mentioned in theſe ſtatutes are to be tolerated. It would be to render void theſe good and wiſe plans, and to ſet the acts of the legiſlature at defiance. The concluſion is, that ſuch inſurances are abſolutely null, and of no effect.

It was ſaid, in a former part of this chapter, that an inſurance upon any goods, the exportation or importation of which was forbidden by the royal proclamation in time of war, was equally void, as if prohibited by ſtatute. The reaſon of this is, that the king's proclamation in time of war has equal force with an act of parliament, and is no leſs binding upon his

1 Black. Com. 270.

his ſubjects. The conſequence of this doctrine is, that the breach of ſuch a prohibition is equally criminal with the breach of a ſtatute; and cannot be founded upon ſuch criminal act, and have any validity. Theſe principles were fully conſidered in the preceding chapter; and the law upon the ſubject was clearly ſettled in the caſe of *Delmada* v. *Motteux*, there cited at length: in which it was held, that the king had an undoubted right to lay on an embargo, in time of war: that the conſequence of a breach of ſuch a proclamation had not been fully aſcertained, but it was certainly a criminal act; and wherever a man makes an illegal contract, the courts of juſtice will not lend him their aid to compel a performance. The underwriter was accordingly diſcharged from the demand ſet up againſt him.

Delmada v. Motteux B. R. Mich. 25 Geo. 3. Vide ante P. 234.

* We come now to conſider thoſe commodities, which from their nature, as well as by the laws of nations, are contraband. Upon this occaſion *Grotius* and *Bynkerſhoek* are the beſt guides, that can poſſibly be followed; and from them we may collect, that it is unlawful to carry any thing to beſieged cities or fortreſſes: a rule which they declare to have been eſtabliſhed by common conſent, and the uſage of all nations. *Grotius* divides goods into three kinds: ſuch as can only be of uſe in time of war; and theſe are clearly contraband, ſuch as arms and ammunition: 2dly. ſuch as anſwer no purpoſe in war, and are merely intended for pleaſure; and theſe may be lawfully conveyed to an enemy. But the third kind are of a mixed nature, ſuch as money, proviſions, ſhips, and the materials of ſhips; in which caſe, before we can decide upon the propriety of exporting ſuch commodities, the ſituation of the war between the contending parties is to be conſidered. Upon this point, his reaſoning is excellent: "If," ſays he, "I cannot de-"fend myſelf without intercepting the commodities intended "for my enemies, neceſſity will give me the right, but ſtill I "ſhall be liable to make reſtitution, unleſs ſome other cauſe of "ſeizure appears. For if the conveyance of ſuch commodi-"ties to the enemy ſhall prevent the execution of my plans, "and he who carried them knew that I had beſieged or block-"aded the town, and that peace or a ſurrender was expected, "he ſhall be anſwerable for the loſs ſuſtained by his miſcon-"duct." With this opinion *Bynkerſhoek* for the moſt part coincides: becauſe, as he obſerves, the ſiege alone is the cauſe why it is not lawful to carry any thing to the beſieged, whether it be contraband or not: for a beſieged city is never compelled to ſurrender by force, but by famine, and the want of other neceſſaries. If it were to be permitted to ſupply them with the things of which they ſtand in need, perhaps the aſſailants would be obliged to raiſe the ſiege. But as it is impoſſible to ſay, of what things the beſieged ſtand in need, or in what they abound,

* P. 255

Grotius, lib. 3. c. 1. Bynk. lib. 1. c. 11.

Lib. 3. c 1. ſ. 5.

L. 1. c. 11.

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abound, every ſpecies of commodity is forbidden to be carried into the garriſon; for otherwiſe there would be no certain rule of ſettling diſputes. This learned author, however, differs from *Grotius*, in that paſſage where he ſays, "the carrier of goods "ſhall be anſwerable, if peace or a ſurrender was expected, "and it was fruſtrated by ſuch means." *Bynkerſhoek* is of *P. 256 *opinion, that ſuch doctrine is neither conſonant to reaſon, nor to the agreements entered into by the laws of nations. He reaſons thus: "Quæ ratio me arbitrum conſtituit de futurâ "deditione aut pace? et ſi neutra expectetur, jam licet obſeſſis "quælibet advehere? imo nunquam licet, durante obſidione, et "amici non eſt cauſam amici perdere, vel quoquo modo dete-"riorem facere. Et qui advexit, non ultra tenebitur, quam "de damno culpâ dato? atquin in ſubditis id ſemper capitale "fuit, quin et in amicis, edicto ante monitis, ſæpe et in non "monitis. Rurſus, ſi quis nondum advexit, ſed, dum adve-"here voluit, deprehendatur, ſola rerum interceptarum reten-"tione erimus contenti, idque donec caveatur, nihil tale in "poſterum commiſſum iri?" He concludes thus: "I do "not agree to that opinion, having learnt from the cuſtom "and uſages of all nations, to ſell all intercepted goods, and "often to inflict, if not a capital, at leaſt a corporal puniſh-"ment"

Grot. Bynk. loc. cit.

Such are the opinions of theſe two very learned writers, who although in ſome reſpects they differ, agree in eſtabliſhing this as a ſettled, undiſputed rule, that whoever conveys any neceſſaries to a beſieged town, camp, or port, is guilty of a breach of the law of nations. This being the caſe, an inſurance upon ſuch commodities muſt neceſſarily be void and of no effect, agreeably to the principles which have already been advanced.

One queſtion only remains to be conſidered; how far inſurances upon goods, the exportation and importation of which are forbidden by the laws of other countries, are valid? In *England*, the law is clear, as it has been laid down by two very great judges, that ſuch inſurances are good; becauſe the foundation of the contract is not illicit. It has been expreſsly held by Lord *Mansfield* more than once, in which he has been confirmed by the whole court of King's Bench, that one nation never takes notice of the revenue laws of another; and therefore ſuch an inſurance was certainly good and valid. A ſimilar opinion ſeems to have been entertained by Lord *Hardwicke*; at leaſt ſo much may be collected from his argument, in a caſe reported in *Vezey*.

Vide ante p. 195.
Doug. 238.

1 Vezey, 319.

*But although this point is ſo clearly ſettled by the law of *England*, in which alſo the law of *France* coincides, it is certain that the expediency of it has been a queſtion which has very much engaged the attention of ſome conſiderable *French* authors. Their opinions can in no way affect the law of *England*,

*P. 257 1 Emerigon p. 210.

land, which ſtands upon much higher authority than the ſentiments of ſpeculative men, however reſpectable; but it may be productive of ſome amuſement, if not inſtruction, to ſee by what arguments the two different opinions are ſupported.

Theſe who contend that ſuch inſurances are illegal, argue in this manner: that they who carry on commerce in a country, are obliged, by the cuſtom of nations, and natural law, to conform to the laws of that country, where they trade. Every ſovereign has power and juriſdiction over every thing done in the country, where he has a right to command; he has conſequently a right to make laws, relative to commerce within his dominions, which bind all thoſe who trade, as well ſtrangers as ſubjects. No one can diſpute with the ſovereign, the right he has to retain in his own country certain merchandizes which are there to be found, and to prohibit the exportation of them. To export them contrary to his orders, is to ſtrike a blow at his undoubted authority; and conſequently it is unjuſt. But admitting, ſay they, that a *Frenchman* would not himſelf be ſubject to the law of *Spain*, for the trade which he carries on in *Spain*, it cannot be denied that the *Spaniards*, whoſe aſſiſtance he requires, are ſubject to thoſe laws; and that they offend extremely in aſſiſting him to export that, the exportation of which is prohibited by law. This ſpecies of trade then is to be conſidered as illicit and contrary to good faith; and conſequently the contract of inſurance, introduced in order to protect it, by charging the inſurer with the riſk of confiſcation, is illicit, and cannot induce any obligation.

Pothier Tr. d'Aſſurances. c. 1. ſ. 2. art. 2. ſ. 9.

Thoſe who ſupport the oppoſite doctrine contend, that the exportation or importation of commodities prohibited by foreign laws is no offence; and that the means employed to effect it are regarded by the law, as a laudable and ingenuous exertion of ſkill. Thus the exportation of certain commodities is prohibited in *Spain*, which the government of that country has a right to do: but the laws of his Catholic Majeſty are not the rule of action for * *Frenchmen*. It is allowed them to bring from *Spain* into *France* piaſtres, piſtoles, and ſilks, for the ſupport of the Banks, the manufactures, and the commerce of that country. Theſe merchandizes are a lawful branch of trade; and there is no reaſon why they ſhould not be the ſubject matter of a contract of inſurance But above all, they inſiſt, that they are juſtified by the conſtant cuſtom; and that the reaſoners on the other ſide ought to be leſs ſtrict, when it is conſidered, that this contraband trade is a vice common to all commercial nations. The *Spaniards* and *Engliſh* in time of peace practiſe it in *France*: it is therefore permitted to carry it on in their reſpective countries, by way of repriſal.

2 Val. Com. 129. 1 Emerigon 212.

* P. 258

Whatever difference there may be on the queſtion of expediency; it is univerſally admitted by the *French* writers, that inſu-

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insurances upon such goods are valid. We have already seen that the same ideas have been adopted by the law of *England*; and that every policy upon goods, the exportation and importation of which is not prohibited by the municipal laws of this country, or by the general laws of nations, is legal and binding upon the parties; and the underwriter must answer for every loss arising by means of any of the usual perils.

* P. 259 * CHAPTER THE FOURTEENTH.

Of Wager-Policies.

HAVING in the four preceding chapters stated the various cases, in which the contract of insurance is void from its very commencement, on account of its repugnancy to those principles of justice, equity, and good faith, which are the great foundation of all contracts between man and man; we proceed to treat of those policies, which by the positive statute law of the country are declared to be absolutely null and void. Of these the largest class are wager-policies, or policies as they are called, upon interest or no interest.

The nature of the contract of insurance, in its original state, was, that a specifick voyage should be performed free from perils; and in case of accidents, during such voyage, the insurer, in consideration of the premium he received, was to bear the merchant harmless. It followed from thence, that the contract related to the safety of the voyage thus particularly described, in respect either of ship or cargo; and that the person insured could not recover beyond the amount of his real loss.

In process of time, however, variations were made, by express agreement, from the first kind of policy; and in cases where the trader did not think it proper to disclose the nature of his interest, the insurer dispensed with the insured having any interest either in the ship or cargo. In this last kind of policy, (of which we are now to treat) "valued free from average," and "interest or no interest," it is manifest, that the performance of the voyage or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance.

Such an object as that, from a reference to the real nature of an insurance, as stated in the outset of the chapter, namely, that it is a contract of indemnity from a real and manifest, not from

* P. 260 * a supposed and ideal loss, must have been originally bad. Indeed it has been declared from the bench, in the reign of queen *Anne*, that

that ſuch inſurances were *formerly* bad; for it is ſaid in that caſe that in former times, if one had no intereſt, though the policy ran, *intereſt or no intereſt*, the inſurance was void; becauſe inſurances were made for the benefit of trade, and not that perſons unconcerned therein, or unintereſted in the ſubject matter, ſhould profit by them. Aſſievedo v. Cambridge. Mod. 77.

The idea thus ſtarted is very much confirmed by what fell from the court in the caſe of *Depaiba* v, *Ludlow:* for the court there obſerved, that inſurances upon intereſt or no intereſt were introduced *ſince* the revolution. Depaiba v. Ludlow. Comyns Rep. 360.

Taking it for granted then, that the law of *England* in this reſpect, previous to the revolution, was ſuch, as theſe caſes ſuppoſe it to be, it was perfectly conſonant to the laws of moſt of the commercial ſtates and countries in *Europe* For we find that by poſitive regulations of *Middlebourg*, *Genoa*, *Konyngſburg*, *Rotterdam*, and *Stockholm*, all inſurances upon wagers, or as intereſt or no intereſt, are declared to be abſolutely void, and of no effect. 2 Mag. 70. 65. 88. 189. 257.

But though this mode of inſuring thus gained a footing in *England*, yet when introduced, the courts of juſtice looked upon theſe contracts with a jealous eye; and by their determinations ſhewed the ſtrong prejudices which they entertained againſt them. The courts of Equity in particular manifeſted that their inclination would lead them as much as poſſible to ſuppreſs ſuch a ſpecies of contract: nay that they ſtill conſidered them as void. This is evident from two caſes in *Vernon's* Reports.

In one of them, the defendant had lent money on a bottomry bond, but had no intereſt in the ſhip or cargo; the money lent was 300*l.* and he inſured 450*l.* on the ſhip: the plaintiff's bill was to have the policy delivered up; becauſe the defendant was not concerned in point of intereſt, as to the ſhip or cargo. Goddart v. Garrett. 2 Vern. 269. Trin. Term 1692.

Per curiam. Take it that the law is ſettled, that if a man has no intereſt, and inſures; the inſurance is void, though it be expreſſed in the policy, *intereſted or not intereſted.* The reaſon the * law goes upon is, that inſurances were made for the benefit of trade, and not that perſons unconcerned therein, and who were not intereſted in the ſhip, ſhould profit thereby; and *where one would have the benefit of the inſurance, he muſt renounce all intereſt in the ſhip.* And the reaſon why the law allows that a man having ſome intereſt in the ſhip or cargo, may inſure more, or five times as much, is that a merchant cannot tell how much or how little his factor may have in readineſs to lade on board his ſhip. *Per Cur.* Decree the policy to be delivered up to be cancelled. * P. 261

From the ſpirit of this deciſion, it may likewiſe appear, that the court of Chancery inclined to think, that an inſurance made without the benefit of ſalvage to the inſurer, was unconſcientious, and a proper ſubject for relief in equity; for the Chancellor

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Chancellor expreſsly ſays, where one would have the benefit of the inſurance, he muſt renounce all intereſt in the ſhip.

In another caſe alſo, which was on a policy of inſurance on goods, by agreement valued at 600*l.* and the inſured not to be obliged to prove any intereſt: the Lord Chancellor ordered the defendant to diſcover what goods he put on board; for although the defendant offered to renounce all intereſt to the inſurers, yet it muſt be referred to the Maſter to examine the value of the goods ſaved, and to deduct it out of the value or ſum of 600*l.* at which the goods were valued by the agreement.

Le Pypre v. Farr. 2 Vern. 716. In Chancery, Mich. Term. 1716.

There was one very remarkable difference between policies upon intereſt, and ſuch as were not, of which I believe notice has already been taken in a former part of this work; namely, that in policies upon intereſt, you recover for the loſs actually ſuſtained, whether it be total or partial: but upon a wager policy, you can never recover but for a total loſs. All the doctrine, which turns upon this diſtinction between intereſt and wager-policies was conſidered at much length by Lord *Manſfield* in the famous cauſe of *Goſs* v. *Withers*, to which we have had occaſion more than once to refer.

2 Burr. 683. Vide. ante. p. 150.

It has already been obſerved, that the ſecurity given to the inſured was very conſiderably encreaſed by the erection of two Aſſurance Companies, which were incorporated by royal charter in the year 1720; for the legiſlature had taken care that thoſe *corporations ſhould have ſufficient funds to anſwer any demands, that might be made upon them, in the common courſe of buſineſs. But this additional ſecurity for the inſured ſoon produced many dangerous and alarming conſequences, which, if they had not been checked, would have proved very detrimental to the trade of this country. For inſtead of confining the buſineſs of inſurances to real riſks, and conſidering them merely as an indemnity to the fair dealer againſt any loſs, which he might ſuſtain in the courſe of a trading voyage, which, as we have ſeen, was the original deſign of them; that practice, which only prevailed ſince the revolution, of inſuring ideal riſks, under the names of *intereſt or no intereſt, or without further proof of intereſt than the policy, or without benefit of ſalvage to the underwriters*, was encreaſing to an alarming degree, and by ſuch rapid ſtrides as to threaten the ſpeedy annihilation of that lucrative and moſt beneficial branch of trade. All theſe various kinds of inſurance juſt enumerated, (and many others, which the ingenuity of bad men found no difficulty in deviſing) having no reference whatever to actual trade or commerce, were very juſtly conſidered as mere gaming or wager-policies: and therefore the legiſlature thought it neceſſary to give them an effectual check, and, by poſitive rules to fix and aſcertain what property or intereſt a merchant ſhould be permitted to inſure.

Vide ante c. 1. p. 8, 9.

* P. 262

Accordingly

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Accordingly an act of parliament paſſed, in the 19th year of the reign of king *George* the Second, entitled "an act to regu- "late inſurance on ſhips belonging to the ſubjects of *Great* "*Britain*, and on merchandizes or effects laden thereon." As this act is the moſt important and moſt extenſive in the whole code of ſtatute law, with regard to inſurances, I ſhall now cite as much of it at length, as relates to the preſent chapter, and afterwards the other clauſes of it under thoſe heads, to which they more immediately apply.

The cauſes, which co-operated to induce the legiſlative body to paſs ſuch an act, are fully ſtated in the preamble. "Whereas "it hath been found by experience, that the making aſſurances "intereſt or no intereſt, or without further proof of intereſt "than the policy, hath been productive of many pernicious "practices, whereby great numbers of ſhips, with their cargoes, "have either been fraudulently loſt and deſtroyed, or taken by "* the enemy in time of war; and ſuch aſſurances have en- "couraged the exportation of wool, and the carrying on many "other prohibited and clandeſtine trades, which by means "of ſuch aſſurances have been concealed, and the parties con- "cerned ſecured from loſs, as well as to the diminution of the "publick revenue, as to the great detriment of fair traders; "and by introducing a miſchievous kind of gaming or wager- "ing, under the pretence of aſſuring the riſk on ſhipping, and "fair trade, the inſtitution and laudable deſign of making aſ- "ſurances, hath been perverted; and that, which was intended "for the encouragement of trade and navigation, has, in many "inſtances, become hurtful of, and deſtructive to the ſame." 19 Geo. 2. c. 37. * P. 263

"For remedy whereof be it enacted, that no aſſurance or Sect. 1
"aſſurances ſhall be made by any perſon or perſons, bodies "corporate or politick, on any ſhip or ſhips belonging to "his majeſty, or any of his ſubjects, or on any goods, mer- "chandizes or effects, laden or to be laden on board of any "ſuch ſhip or ſhips, *intereſt or no intereſt, or without further "proof of intereſt than the policy, or by way of gaming, or wager- "ing, or without benefit of ſalvage to the aſſurer*; and that every "ſuch inſurance ſhall be null and void to all intents and pur- "poſes."

"Provided always, that aſſurance on private ſhips of war Sect. 2.
"fitted out by any of his majeſty's ſubjects ſolely to cruize "againſt his majeſty's enemies, may be made by or for the "owners thereof, intereſt or no intereſt, free of average, and "without benefit of ſalvage to the aſſurer; any thing herein "contained to the contrary thereof in any wiſe notwithſtand- "ing."

"Provided alſo, that any merchandizes or effects from any Sect. 3.
"ports or places in *Europe*, or *America*, in the poſſeſſion of the

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" Crowns of *Spain* or *Portugal*, may be aſſured in ſuch way " and manner, as if this act had not been made."

(*a*) The fourth ſection relates to re-inſurances, which will be the ſubject of the following chapter.

(*a*) Sect. 4.

Sect. 5.

" And be it enacted, that all and every ſum and ſums of " money to be lent on bottomry, or at *reſpondentia*, upon any " ſhip or ſhips belonging to any of his majeſty's ſubjects, bound
* P. 264 " * to or from the *Eaſt Indies*, ſhall be lent only on the ſhip, or on " the merchandize, or effects, laden, or to be laden, on board " of ſuch ſhip, and ſhall be ſo expreſſed in the condition of the " ſaid bond: and the benefit of ſalvage ſhall be allowed to the " lender, his agents or aſſigns, *who alone ſhall have a right to* " *make aſſurance on the money ſo lent:* and no borrower of money " on bottomry or *reſpondentia*, as aforeſaid, ſhall recover more " on any aſſurance than the value of his intereſt in the ſhip, or " in the merchandizes or effects, laden on board of ſuch ſhip, " excluſive of the money ſo borrowed; and in caſe it ſhall ap- " pear, that the value of his ſhare in the ſhip, or in the mer- " chandizes or effects laden on board, doth not amount to the " full ſum or ſums he hath borrowed as aforeſaid, ſuch borrower " ſhall be reſponſible to the lender for ſo much of the money " borrowed, as he hath not laid out on the ſhip or merchandize " laden thereon, with lawful intereſt for the ſame, together with " the aſſurance, and all other charges thereon, in the propor- " tion the money not laid out, ſhall bear to the whole money " lent, notwithſtanding the ſhip and merchandizes be totally " loſt."

Upon this laſt ſection, of which we ſhall treat more fully in the chapter on Bottomry, it may be ſufficient in this place to obſerve, that none but the lender ſhall have a right to make inſurance on the money lent. It is alſo to be remarked, that this regulation of inſurance on bottomry or *reſpondentia* intereſt, extends only to *Eaſt India* ſhips: and therefore, an inſurance of a *reſpondentia* intereſt upon any other ſhips may be made in the ſame manner as they uſed to be before this act. It has alſo been decided upon this clauſe of the act, that it never meant or intended to make any alteration in the manner of inſurances: and it was declared by the whole court in the caſe of *Glover* v. *Black*, which was fully reported in a former chapter, to be the eſtabliſhed law and uſage of merchants, that *reſpondentia* and bottomry muſt be mentioned and ſpecified in the policy of inſurance.

Glover v. Black. 3 Burr. 1394. Vide ante c. 1. p. 10.

By the firſt ſection of the act it is clear that at this day all inſurances made contrary to it are abſolutely void and of no effect; which, as has already been ſhewn, was alſo the caſe by the ancient law of this country. It may now be material to conſider
* P. 265 * firſt, what caſes have, by the conſtruction put by the learned judges upon this ſtatute, been held not to fall within its deſcrip-

tion

tion: and ſecondly, thoſe which do, and in which, the policies have conſequently been holden to be void.

It was formerly a matter of doubt, whether the act was meant to extend to inſurances of foreign property, and on foreign ſhips. The better opinion, however, was, that it did not; for it was clear, that ſuch inſurances did not fall within the words of the ſtatute; and from an attentive conſideration of the preamble, they do not ſeem to come under the deſcription of the miſchiefs, againſt which it was the intention of the legiſlature to provide. But theſe doubts are entirely at an end by ſeveral deciſions of the courts; and particularly by a very modern caſe, in which it was expreſsly declared by the court, (and the reaſon for it ſtated) that the act was not deſigned to extend to foreign ſhips.

The caſe was this: the policy was on goods, on board three *French* veſſels, from *St. Domingo* to *Bourdeaux*. The material part of it, as to this caſe, was in the following words: "On "all goods loaden or to be loaden on board the ſhips *Le Soigneux*, "*La Pucelle*, *La Vainqueur*, all or any of them. The ſaid goods "and merchandizes by agreement are, and ſhall be valued at "(*a*) on 25 caſks of clayed ſugar, and 12 "hogſheads of muſcavadoes: *the policy to be deemed ſufficient "proof of intereſt, in caſe of loſs.*" The firſt count in the declaration ſtated, that goods to a great amount, being the property of certain foreigners, had been ſhipped on board *Le Soigneux*, and that ſhe had been loſt. The ſecond averred, that the goods were ſhipped on board *the three ſhips, or ſome or one of them*, to the amount of the ſum inſured; and that two of them had been captured, and the other loſt.

Thelluſſon v. Fletcher. Doug. 301.

This caſe came before the court upon a motion to ſet aſide the writ of enquiry, which had been executed before the ſheriff, after a judgment by default, on this ground: that the jury had aſſeſſed the damages to the amount of the defendant's ſubſcription, without any proof of the amount or value, or any evidence whatever, except that of the defendants handwriting to the * policy. In addition to this objection, an affidavit was produced, tending to ſhew, that in fact the inſured had no intereſt. It was argued for the defendant, that by the expreſs agreement of the parties, no other proof of intereſt but the policy was required; and this inſurance on foreign ſhips and property was not within the ſtatute prohibiting ſuch policies; ſo that the plaintiff was entitled to recover the ſum inſured by the defendant, even if it could be proved that the inſured had no property on board. The court ſaid that this was not a policy within the ſtatute, foreign ſhips not having been included in that act, on account

* P. 266

(*a*) This was blank, as here printed.

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of the difficulty of bringing witneſſes from abroad to prove the intereſt The only difficulty there could have been here, was from the circumſtance of there having been three ſhips; but the ſecond count was ſo framed, as to make the caſe the ſame as if there had been but one. By ſuffering judgment to go by default, the defendant has confeſſed the plaintiff's title to recover; and the amount was fixed by the ſtipulation in the policy.

It was formerly thought, that a *valued* policy was a wager policy, like intereſt or no intereſt. But this idea is now exploded, as we ſhall preſently ſhew by a ſolemn deciſion of the court of King's Bench. Of the difference between open and valued policies much has been already ſaid; and the origin of the latter was derived from this ſource, it being ſometimes troubleſome to the trader to prove the value of his intereſt, or to aſcertain the quantity of his loſs, he gave the inſurer a higher premium to agree to eſtimate his intereſt at a preciſe ſum. To recover upon this kind of policy, the inſured need only prove that he had an intereſt, without ſhewing the value. If indeed it appeared, or could be made appear, that the intereſt proved was merely a cover to a wager, in order to evade the ſtatute, there is no doubt ſuch a policy would be void.

Vide ante c. 1.

All this doctrine was very fully ſtated, and commented upon by Lord *Mansfield*, in giving judgment in a cauſe then depending in the court of King's Bench. " A valued policy," ſaid his Lordſhip, " is not to be conſidered as a wager policy, or " like *intereſt or no intereſt*. If it were, it would be void by " the act of 19 *Geo.* 2. *c.* 37. The only effect of the valuation " is fixing the amount of the prime coſt; juſt as if the parties
• P. 267 " * had admitted it at the trial: but in every argument, and for " every other purpoſe, it muſt be taken that the value was fixed " *in ſuch a manner*, as that the inſured only meant to have an " indemnity. If it be undervalued, the merchant himſelf " ſtands inſurer for the ſurplus. If it be *much overvalued*, it " muſt be done with a bad view; either to gain, contrary to " the 19th of the late king; or with ſome view to a fraudulent " loſs therefore an inſured never can be allowed to plead in a " court of juſtice, that he has greatly overvalued, or that his " intereſt was a trifle only. It is ſettled, that upon valued " policies the merchant need only prove ſome intereſt, to take " it out of 19 *Geo.* 2. becauſe the adverſe party has admitted the " value: and if more were required, the agreed valuation " would ſignify nothing. But if it ſhould come out in proof, " that a man had inſured 2000*l.* and had intereſt on board to " the value of a cable only; there never has been, and I believe " there never will be a determination, that by ſuch an evaſion " the act of parliament may be defeated. There are many con- " veniencies from allowing valued policies: but where they " "are

Lewis v. Rucker. 2 Burr. 1167.

Vide ante c. 6 p. 104.

" are uſed merely as a cover to a wager, they would be con-
" ſidered as an evaſion. The effect of the valuation is only
" fixing concluſively, the prime coſt. If it be an open policy,
" the prime coſt muſt be proved: in a valued policy it is
" agreed." For theſe reaſons Lord *Mansfield* held, that a valued policy is not void by the ſtatute of the 19 *Geo.* 2.

The paſſage juſt quoted at length was, in a ſubſequent caſe, referred to in the judgment of the court; and the doctrine there advanced was adopted and confirmed.

Grant v. Parkinſon, Michaelm. 22 Geo. 3. in B. R.

It was an action on a policy of inſurance on the ſhip *Providence*, at and from *Surinam*, or whatſoever other ports in the *Weſt Indies* at which the ſhip might load, to *Quebec*. At the trial before Lord *Mansfield*, at the ſittings after *Trinity* Term 1781, the principal queſtion on the merits was, whether the plaintiff had an inſurable intereſt. It was an inſurance on the profits expected to ariſe on a cargo of moloſſes belonging to the plaintiff, who had a contract with government to ſupply the army with ſpruce beer. Lord *Mansfield* thought it an inſurable intereſt. But the part of the caſe, which calls for our attention at preſent, was a clauſe declaring, " that in caſe
" of loſs, it was agreed that the profits ſhould be valued at 1000*l.* * P. 268
" without any other voucher than the policy." This, it was inſiſted, rendered the policy void, as well within the letter, as within the ſpirit of the 19 *Geo.* 2. *c.* 37.

Lord *Mansfield*, at the trial, inclined to think that the contract was a fair one; but ſtill he could not get over the objection, the inſtrument being void on the face of it. His Lordſhip, however, ſaved the point for the opinion of the court, a verdict being entered for the plaintiff, ſubject to that reference.

In *Michaelmas* Term following the matter came on to be heard; when, after full argument at the bar,

Lord *Mansfield*, C. J. ſaid: " I have, ſince the ſittings at
" *Guildhall*, on further conſideration, changed my opinion. I
" then thought the preſent policy within the act of parliament:
" I now think otherwiſe. On the conſtruction of the act, it
" has uniformly been held. that a valued policy is not void. It
" is incumbent on the plaintiff to prove ſome intereſt; but it is
" not neceſſary to go into the whole value. In the caſe of
" *Lewis* v. *Rucker*, this doctrine was much conſidered."—
[Here his Lordſhip read the words already reported, and then he proceeds thus] " This inſurance is on the profits of a cargo,
" belonging to a man, having a contract to ſupply the army,
" and if it arrive the profits are pretty certain. The meaning
" of the policy is not to evade the act of parliament, but to
" avoid the difficulty of going into an exact account of the
" quantum. I cannot diſtinguiſh it from a valued policy; and
" there is no pretence for ſaying it is a *wagering* one." The

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other judges concurred; and the *poſtea* was given to the plaintiff.

In another caſe it alſo appeared, that an inſurance had been made upon any of the packet-boats that ſhould ſail from *Liſbon* to *Falmouth*, or ſuch other port in *England* as his majeſty ſhould direct, for one year, from *October* 1763, to *October* 1764, upon any kinds of goods and merchandizes whatſoever. And it was agreed, that the goods and merchandizes *ſhould be valued at the ſum inſured* on ſuch packet-boat, *without farther proof of intereſt than the policy*; and to make no return of premium for want of intereſt being on bullion or goods. The inſured had an intereſt * in bullion on board the *Hanover* packet, being one of the king's packets between *Liſbon* and *Falmouth*: and it was totally loſt within the time mentioned in the policy.

Da Coſta v. Firth; 4 Burr. 1966.

* P. 269

This caſe has already been quoted for another purpoſe: but on this point, the court held, that this was a policy of a peculiar ſort; and was an exception out of the ſtatute of 19 *Geo.* 2. *c.* 37. It is a mixed policy; partly a wager-policy, partly an open one: and it is a valued policy, and fairly ſo, without fraud or miſrepreſentation. Therefore the loſs having happened, the inſured is intitled as for a total loſs.

Vide ante p. 118, 164.

It has alſo been ſolemnly ſettled, that, upon a joint capture by the army and navy, the officers and crews of the ſhips, before condemnation, have an inſurable intereſt, by virtue of the prize act, which uſually paſſes at the commencement of a war.

This was ſo held in an action upon a policy of inſurance on the ſhip *St. Domingo*, at and from *Omoa* to *London*; upon which a caſe was reſerved for the opinion of the court. The facts of the caſe were theſe: Captain *Luttrell*, commanding five of his majeſty's ſhips, and Captain *Dalrymple*, commanding a party of the land forces, captured two *Spaniſh* regiſter ſhips, lying under the protection of Fort *Omoa*: that the ſhip *St. Domingo* (on which the inſurance was made) was one of the prizes, and was coming home laden with the property then captured; upon which ſhip the defendant underwrote 500*l.*: and that the ſhip was loſt by perils of the ſea. The queſtion was, whether, by virtue of the prize act of the 19 *Geo.* 3. *c.* 67. the officers and crew of the ſhips under captain *Luttrell* had ſuch an inſurable intereſt in the *St. Domingo*, as to entitle them to recover?

Le Cras v. Hughes B. R. Eaſt. 22 Geo. 3.

Lord *Mansfield*.—"There are two queſtions in this cauſe: 1ſt Whether the ſea officers had an inſurable intereſt? This will depend on the prize act and proclamation. 2dly. Whether poſſeſſion would entitle them to inſure, upon the bare contingency of a future grant from the crown? As to the firſt, conſider the act of parliament, which gives to all the people on board, that is, to the flag officers, commanders, and other officers; to the ſeamen, marines, and ſoldiers on board every ſhip

* ſhip and veſſel of war, the ſole intereſt and property of and in all and every ſhip and veſſel, goods, and merchandizes, which they ſhall take during the war, after condemnation. Does the act ſay, that the ſeamen only ſhall take? does it leave a joint capture by the army and navy undefined? Certainly not. Suppoſe, for inſtance, a caſe which I remember to have happened: a *Dutch* and *Engliſh* fleet combined captured ſome ſhips; the *Engliſh* ſailors could not take ſolely; nor could the act mean that they ſhould have nothing. In the caſe in queſtion, ſuppoſe captain *Dalrymple* had given no aſſiſtance, is there any doubt that captain *Luttrell* would have taken the whole? The only difference is, that now he has not the merit of a ſole capture. The word "*ſoldiers*" in the proclamation, means ſoldiers on board the ſhip. Thus it ſtands on the act and proclamation. But ſuppoſing that doubtful, as far back as queen *Anne's* time down to the preſent, wherever a capture has been made by a king's ſhip or a privateer, the crown has always given a grant of it after condemnation. There is no inſtance to the contrary. Has not then the inſured ſuch an intereſt in the ſhip coming home, as to entitle them to an indemnity? Suppoſe a man is made agent of prizes; he has not the poſſeſſion of the property, and yet he has ſuch an intereſt in any ſhip coming home, that he may inſure. Here the inſured have the poſſeſſion, and a certain expectation of receiving the property captured for their own emolument from the crown."

* P. 270

Judgment for the plaintiff.

In the conſtruction of the act it has been holden, that all inſurances made by perſons having no intereſt in the event, about which they inſure, or without reference to any property on board, are merely wages, deſtructive of the true ends for which this contract was introduced into the mercantile world; and therefore are to be conſidered as abſolutely null and void.

Upon a motion for a new trial, Lord *Mansfield*, who had tried the cauſe, made the following report: This was an action brought by the plaintiff, who was a ſurgeon on board an *Eaſt Indiaman*, againſt the defendant, a paſſenger in the ſame ſhip, to recover a ſum of 1000*l.* upon a ſpecial agreement, bearing date the 18th of *July* 1774; by which, after reciting, that "* whereas the plaintiff had agreed to pay to the defendant the "ſum of 20*l.* ſterling at the next port the ſhip ſhould arrive at, "it was witneſſed that he the defendant, in conſideration "thereof, did undertake that the ſaid ſhip ſhould ſave her paſ"ſage to *China* that ſeaſon; and in caſe ſhe did not, that then "he would pay to the plaintiff the ſum of 1000*l.* at the end of "one month after the arrival of the ſaid ſhip in the river "*Thames*." At the trial it appeared, that the plaintiff duly paid the amount of the 20*l.* to the defendant at the next port, in pagodas: that the veſſel being delayed below the Cape and

Kent v. Bird. Cowp. 583.

* P. 271

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Madras, in conſequence of a miſcalculation of five days in the reckoning, and the monſoons ſetting in earlier than uſual, ſhe loſt her paſſage. That the plaintiff had *ſome goods* on board, which were liable to ſuffer by the loſs of the ſeaſon; and that whilſt it was ſtill doubtful whether the ſhip would or would not ſave her paſſage, the captain had applied to each of the parties, to perſuade them to reſcind the agreement; repreſenting that the ſum to be paid in either event would be more than the loſer could afford. That the plaintiff was willing to have cancelled the agreement; but the defendant poſitively refuſed. The jury found a verdict for the plaintiff, damages 980*l.* but I gave the defendant leave to move for a new trial upon the queſtion, whether this were not an agreement within the ſtatute 19 *Geo.* 2. *c.* 37, and therefore void.

After this caſe had been fully argued at the bar,

Lord *Mansfield* ſaid: A policy of inſurance is, in the nature of it, a contract of indemnity, and of great benefit to trade. But the uſe of it was perverted by its being turned into a wager. To remedy this evil, the ſtatute of the 19 *Geo.* 2. *c.* 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perverſion of this ſpecies of contract; and amongſt others, that of gaming or wagering under pretence of inſuring veſſels, *&c.* proceeds under general words, to prohibit *all* contracts of inſurance by way of *gaming* or *wagering*. Here, the plaintiff gives ſo much to the defendant in conſideration that the ſhip ſhould ſave her paſſage to *China*; and if not, then, upon her returning ſafe to *England*, he is to receive 1000*l.* If the firſt of theſe events happened, the defendant won; but he could not loſe, unleſs
* P. 272 * both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering policies would be turned into this form, and the act would be entirely defeated. If there is no intereſt in the caſe, it is gaming and wagering. Therefore there muſt be a new trial.

From this caſe we find, that the principle ſtated by Lord *Mansfield* in *Lewis* v. *Rucker* is confirmed: namely, that where a man inſures 2000*l.* and it turns out in proof that he has an intereſt to the value of a cable only, ſuch an intereſt will never be allowed to operate ſo as to evade the ſtatute. For in this caſe, it appeared in evidence, that the plaintiff had *ſome goods* on board; but that was held not to be an intereſt ſufficient to juſtify an inſurance ſo evidently contrary to the act of parliament.

Indeed wherever the court can ſee upon the face of the policy, that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare ſuch policy void.

The

Lowry and Another v. Bourdieu. Doug. 451.

The plaintiffs had lent to *Lawſon*, captain of the *Lord Holland Eaſt Indiaman*, 26,000*l.* for which he had given them a common bond, in the penal ſum of 52,000*l.* While he was with his ſhip at *China*, the plaintiffs got a policy of inſurance underwritten by the defendant and others, which was in the following terms: "at and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the ſaid ſhip at *Canton*, in *China*, &c. and *upon the ſaid ſhip*, from and immediately following her arrival at *Canton* in *China*, valued at 26,000*l.* being the amount of "Captain *Patrick Lawſon's* common bond, payable to the parties, as ſhall be deſcribed at the back of this policy; and it bears date the 16th "day of *December* 1775; and in caſe of loſs, *no other proof of* "*intereſt to be required than the exhibition of the ſaid bond:* "warranted free from average, and without benefit of ſalvage "to the inſurer."

At the head of the ſubſcription was written, "*On a bond as above expreſſed.*" Captain *Lawſon* ſailed from *China*, and arrived ſafe with his privilege (as it is called) or adventure, in * *London*, on the 1ſt of *July* 1777, none of the events inſured againſt having happened. The receipt of the premium was acknowledged on the back of the policy. This caſe came before the court upon an action for a return of premium, on the ground that the policy being without intereſt, the contract was void. This caſe, as far as it relates to the queſtion of return of premium, will be conſidered in a future chapter: but in the courſe of the diſcuſſion, it became neceſſary to determine, whether the policy, juſt recited, was good within the ſtatute. At the trial, which came on at the ſittings after *Trinity* term, 1780, the Chief Juſtice was of opinion, that this was a gaming policy prohibited by the ſtatute of 19 *Geo.* 2. *c.* 37. and a verdict was given for the defendant. His lordſhip, however, having expreſſed a doubt upon the propriety of his opinion on other points of the cauſe, a motion for a new trial was afterwards made, and all the queſtions came to be debated before the court: when the majority of the judges confirmed Lord *Mansfield's* firſt direction upon all the points. It is true Mr. Juſtice *Willes* differed from his brethren upon that occaſion; the learned judge being of opinion, upon the queſtion relating to our preſent enquiry, that this was not a gaming policy: that it did not appear to him, that the parties had any idea they were entering into an illegal contract: that the whole was diſcloſed, and they *thought* there was an intereſt; this was a miſtake; but it is a new point of law.

* P. 273

The three other judges ſupported their opinions upon the following grounds.

Lord *Mansfield.*—It is certainly true, in many inſtances, that firſt thoughts are beſt. I am now very much inclined to my

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my first opinion. There are two sorts of policies of insurance; mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form; but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard, like the cast of a die. In the present case, the nature of the insurance is known to both parties. The plaintiffs say, "We "mean to game; but we give our reason for it; Captain P. 274 "*Lawson owes us a sum of money, and we want to be secure in "case he should not be in a situation to pay us." It was a hedge. But they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy; and against an act of parliament.

Mr, Justice *Ashhurst*.—A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice, which shews decisively that this was a gaming policy.

Mr. Justice *Buller*.—It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the *law* was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy without interest. Agreeably to this opinion, the rule for a new trial was discharged.

The second section of the act in question, which allows of insurances being made on private ships of war, interest or no interest, seems sufficiently clear, and requires no explanation.

The third section, by which insurances upon any merchandizes or effects from any ports or places in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal* may be effected in the manner practised before this act was passed, seems to be obscurely worded. The learned commentator upon the law of *England* observes, that the reason of this proviso is sufficiently obvious. Notwithstanding this authority, in order to comprehend the meaning of the legislature, we must observe, that the trade from *Spain* and *Portugal*, to their respective colonies and establishments in *South America*, and the returns thereof, can only be carried on by their own subjects; and all other persons are prohibited from that trade by positive regulations of these respective states. The consequence of such a prohibition is, that all the goods and merchandizes, which the subjects of this and other countries export from *Spain* and *Portugal*, must be in the names of *Spanish* subjects. So that it was absolutely necessary to make this exception; (for no other proof, but the policy itself can be brought) otherwise all insurances upon that branch of trade must have been entirely void.

Mr. Justice Blackstone, 2 Vol. Com. 460.

The

* The words, however, ſeem to allow a greater latitude than was meant by the legiſlature in making ſuch a proviſion: for by adverting merely to the words, inſurances from any ports or places in *Europe* or *America*, belonging to *Spain* and *Portugal* to *England* or other ports of *Europe* may be made, as if this act had never paſſed. Whereas by attending to the prohibition of trade juſt mentioned to any but the ſubjects of *Spain* and *Portugal*, as the commerce between theſe colonies and the parent countries can only be carried on by ſubjects, it is evident that the legiſlature intended rather to have ſaid, that inſurances on goods from ports belonging to *Spain* and *Portugal* in *Europe* to any ports in *America* belonging to thoſe courts; and from ſuch ports in *America* to ſuch ports or places in *Europe*, ſhall be valid and effectual contracts, than to authorize inſurances from the dominions of *Spain* and *Portugal* in *Europe* or *America*, to whatſoever place in the world the ſhip, in which theſe goods are to be carried, may happen to be deſtined. The words, however, certainly admit of that broad conſtruction; for the place of deſtination is not aſcertained. * P. 275

Upon this ſection of the act, it may be obſerved, that the equitable conſtruction of ſuch contracts of inſurance as are protected by it, ſeems to be, that they may be made without intereſt, notwithſtanding the caſe of *Goddart* v. *Garrett*, above cited: ſince in ſuch inſtances it is impoſſible for the perſon inſured to bring any certain proof of intereſt on board. V. ante p. 260.

Hitherto we have ſpoken merely of that part of this very ſalutary act, which requires, that every perſon making ſuch a contract, ſhould have an intereſt in that, which is the object of the inſurance. Another part of it ſtill claims our attention, that which prohibits re-aſſurances. What a re-aſſurance is; in what caſes it is prohibited; and when it is allowable, will form the ſubject of the following chapter.

* CHAPTER THE FIFTEENTH. * P. 276

Of Re-Aſſurance: and Double Inſurance.

RE-ASSURANCE, as underſtood by the law of *England*, may be ſaid to be a contract, which the firſt inſurer enters into, in order to relieve himſelf from thoſe riſks which he has incautiouſly undertaken, by throwing them upon other underwriters, who are called re-aſſurers. This ſpecies of contract has obtained a place in moſt of the commercial ſyſtem of the trading powers of *Europe*; and it is allowed by them at this day to be politic and legal. The learned *Roccus* has decided ex-

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expreſsly in favour of it; and has recited many reſpectable authorities in ſupport of his opinion. "Aſſecurator, poſt "factam aſſecurationem, poteſt ſe aſſecurari facere ab alio "aſſecuratore, et iſte ſecundus aſſecurator tenetur pro aſſecu-"ratione factâ a primo, et ad ſolvendum omne totum, quod "primus aſſecurator ſolverit, et iſta ſecunda aſſecuratio valet."

Roccus de Aſſecur. Not. 12.

By the ancient law of *France* ſuch aſſurances were reckoned valid, and perfectly conſiſtent with equity and good conſcience. The author of the Guidon obſerves, that if it ſo happen that the inſurers, after underwriting the policy, repent of their engagement, or are afraid to encounter the riſk, they are at liberty to re-inſure; but ſtill they cannot prevent the inſured from making his demand upon them in caſe of loſs, for having by their ſignature, promiſed indemnity, they cannot, by any proteſtations to the contrary, diſcharge themſelves from their reſponſibility, without the conſent of the inſured. *Lewis* the Fourteenth, when, by the aſſiſtance of the famous *Colbert*, he promulgated thoſe ordinances, which will be a laſting honour to the *French* nation, adopted the idea that prevailed when the Guidon was written: for by an article in that celebrated code of laws, he expreſsly declared, "that it ſhould be lawful to "the inſurers to make re-aſſurance with other men of thoſe "effects, which they had themſelves previouſly inſured." It * is not in *France* alone that this law prevails; for by the poſitive and expreſs regulations and ordinances of *Koningſberg*, *Hamburgh*, and *Bilboa*, re-aſſurances are allowed to be effected, and conſequently are lawful contracts.

Le Guidon. c. 2. art. 19.

Ord. Lewis 14. tit. Aſſur. art. 20.

2. Mag. 190. 233, 419.

* P. 277

By the paſſage cited from the Guidon it might be obſerved, that it was a diſtinguiſhing character of this ſpecies of contract, that notwithſtanding a re-inſurance, the firſt contract ſubſiſts as at firſt, without change or amendment. The re-inſurer is wholly unconnected with the original owner of the property inſured; and as there was no obligation between them originally, ſo none is raiſed by the ſubſequent act of the firſt underwriter. The riſks of the inſurer form the object of the re-inſurance, which is a new independant contract, not at all concerning the inſured; who conſequently can exerciſe no power or authority with reſpect to it.

1 Emerigon p. 247.

Pothier, tit. Aſſurance No. 96.

Agreeably to the laws of thoſe countries juſt referred to, and conſiſtently with the opinions of thoſe reſpectable writers, whoſe works we have had ſuch frequent occaſion to mention, the law of *England* adopted their regulations, and permitted the underwriters upon policies to inſure themſelves againſt thoſe riſks for which they had inadvertently engaged to indemnify the inſured; or where perhaps they had involved themſelves to a greater amount, than their ability would enable them to diſcharge. Although ſuch a contract ſeems perfectly fair and reaſonable in itſelf, and might be productive of very bene-

beneficial consequences to those concerned in this important branch of trade; yet, like many other useful institutions, it was so much abused, and turned to purposes so pernicious to a commercial nation, and so destructive of those very benefits it was originally intended to promote and encourage, that the legislature was at last obliged to interpose, and by a positive law to cut off all oportunity of practising those frauds in future, which were become thus glaring and enormous. CHAP. XV.

Accordingly by the fourth section of that statute, which formed the subject of the preceding chapter, it was enacted, 19 Geo. 2. c. 37. s. 4. "that it should not be lawful to make RE-ASSURANCE, unless "the assurer should be insolvent, become a bankrupt, or die; "in either of which cases, such assurer, his executors, ad- "* ministrators, or assigns, might make re-assurance, to the "amount before by him assured, provided it should be expressed "in the policy to be a re-assurance." * P. 278

From this act it is apparent, that all kinds of re-assurance are not prohibited: but wherever such a contract tends to the advancement of commerce, or to the real benefit of an individual, in such a case it shall be permitted. Thus in case of insolvency or bankruptcy, it is advantageous to the creditors in general, as well as to the individual, that a re-assurance should be made: for by these means the fund of the bankrupt's estate is not diminished in case of loss, and the insured has a better security for the payment of the amount of his damage, or at least a proportion of it. *(a)* If the insurer die, it is no less

(a) Formerly, if an underwriter became a bankrupt after he had subscribed the policy, and before a loss happened, the insured was not entitled to a dividend out of the bankrupt's estate. This being found a heavy inconvenience, and a discouragement to trade, parliament was obliged to interpose, and to alter the law in this respect. The statute recited, "that merchants and tra- 19 Geo. 2. "ders frequently lend money on bottomry, or at *respondentia*, c. 32. s. 2. "and in the course of their trade, frequently cause their ships "or vessels, and the goods and merchandizes loaded thereon, to "be insured; and that where commissions of bankruptcy have is- "sued against the obligor in such bottomry or *respondentia* bond, "or the underwriter, or assurer in such assurance, before the "loss of the ship or goods, in such bond or policy of insurance "mentioned, had happened, it had been made a question, whe- "ther the obligee or obligees in such bond, or the assured in "such policy of insurance, should be let in to prove their debts, "or be admitted to have any benefit or dividend under such "commission, which might be a discouragement to trade." It was therefore enacted, "that the obligee in any bottomry, or "*respondentia* bond, and the assured in any policy of insurance, "made

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* P. 279

leſs neceſſary and beneficial to his ſucceſſors, that there ſhould be a re-aſſurance, than it was in the former caſe of a bankruptcy*: becauſe it will provide aſſets to ſatisfy the inſured in caſe a loſs ſhould happen, and thus ſecure the eſtate of the deceaſed for the benefit of his heirs. Indeed, in both caſes, the intention of the legiſlature ſeems to have been, to provide a fund for the payment of that proportion, which in caſe of an inſolvency, the inſured will have a right to demand, in common with the other creditors; and for the payment of the whole, without prejudice to the heir, even in caſes where the anceſtor, at the time of his death, was in ſolvent circumſtances.

This act is worded in ſuch expreſs terms, excluding every ſpecies of re-aſſurance, except in the three inſtances of death, bankruptcy, or inſolvency, that a doubt, as it ſhould ſeem, could hardly be founded upon it. But as it was held, that the firſt clauſe of the ſtatute, prohibiting inſurances, *intereſt or no intereſt*, did not extend to foreign ſhips; ſo it was argued, that re-aſſurances made here on *the ſhips of foreigners* did not fall within the act. It might have occurred, however, that the firſt clauſe of the ſtatute is qualified, and only prohibits ſuch inſurances when made *on his majeſty's ſhips, or the ſhips belonging to his majeſty's ſubjects:* whereas the clauſe in queſtion is general and without reſtriction; the inference from which is, that the legiſlature had both objects in view, and meant wholly to prohibit the one, but not the other.

Vide ante, c. 14.

" made and entered into, upon a good and valuable conſideration, *bonâ fide*, ſhould be admitted to claim; and after the loſs or contingency ſhould have happened, to prove his, her, or their debt and demands, in reſpect of ſuch bond or policy of inſurance, in like manner as if the loſs or contingency had happened before the time of the iſſuing of ſuch commiſſion of bankruptcy againſt ſuch obligor or inſurer; and ſhould be entitled unto, and ſhould have and receive, a proportionable part, ſhare, and dividend of ſuch bankrupt's eſtate in proportion to the other creditors of ſuch bankrupt, in like manner, as if ſuch loſs or contingency had happened before ſuch commiſſion iſſued: and that all and every perſon and perſons, againſt whom any commiſſion of bankruptcy ſhould be awarded, ſhould be diſcharged of and from the debt or debts, owing by him, her, or them, on every ſuch bond and policy of inſurance as aforeſaid, and ſhould have the benefit of the ſeveral ſtatutes now in force againſt bankrupts in like manner, to all intents and purpoſes, as if ſuch loſs or contingency had happened, and the money due in reſpect thereof had become payable, before the time of the iſſuing out the commiſſion."

This

This point came on to be conſidered by the Court of King's Bench, in the year 1787, in the form of a ſpecial caſe, ſtating that a re-aſſurance was made by the defendant on a *French veſſel*, firſt inſured by a *French underwriter* at *Marſeilles*, who was living, and who, at the time of ſubſcribing the ſecond policy, was ſolvent.

Andree v. Fletcher. 2 Term. Rep. 161.

The court (*Aſhhurſt*, *Buller*, and *Groſe*, juſtices) were unanimouſly of opinion, that this policy of re-aſſurance was void: and that every re-aſſurance in this country, either by *Britiſh* ſubjects or foreigners, on *Britiſh* or foreign ſhips, is void by the ſtatute; *unleſs the firſt aſſurer be inſolvent, become a bankrupt, or die.*

* There is another ſpecies of re-aſſurance allowed by the laws of *France*, as eſtabliſhed by an ordinance of *Lewis* the Fourteenth, which was alſo taken from that ancient and excellent *French* treatiſe, that has been ſo frequently mentioned. By this regulation, it is declared lawful for the aſſured to inſure the ſolvency of the underwriter. By theſe means, the perſon inſured gets rid of thoſe fears, which he may have conceived concerning the ability of the inſurers to pay, and he gains a ſecond ſecurity to anſwer for the ſufficiency of the firſt. But it is not to *France* alone that this kind of contract is reſtrained; for by the poſitive laws of many other maritime ſtates, ſuch re-aſſurances are valid and binding contracts. The *Engliſh* ſtatute, which has been the ſubject of this and the preceding chapter, takes no expreſs notice of this ſort of inſurance; becauſe, in truth, I believe, it never was very much in practice in *England*: but, however, it ſeems clear, that ſuch a circumſtance, as the ſolvency of the underwriter, is not an inſurable intereſt; that a policy opened upon ſuch an event would be treated as a wager-policy; and would conſequently fall within the ſtatute of *George* the Second, which declares all policies made by way of gaming or wagering, to be abſolutely null and void to all intents and purpoſes.

* P. 280

Le Guidon c. 2. art. 20

Ord. of Lewis 14 tit. Aſſu. art. 20.

2. Mag. 190, 419.

Having ſaid thus much of re-aſſurances, I ſhall proceed to conſider the nature of a double inſurance, and to ſtate the few caſes that have been determined upon the ſubject. I treat of it in this place, becauſe theſe two kinds of inſurance have been ſometimes confounded together, and ſuppoſed to mean the ſame thing: whereas no two ideas can be more diſtinct. We have already ſeen what is meant by a re-aſſurance. A double inſurance is where the ſame man is to receive two ſums inſtead of one, or the ſame ſum twice over, for the ſame loſs, by reaſon of his having made two inſurances upon the ſame goods or the ſame ſhip. The firſt diſtinction between theſe two contracts is, that a re-aſſurance is a contract made by the firſt underwriter, his executors or aſſigns; to ſecure himſelf, or his eſtate: a double inſurance is entered into by the inſured. A re-aſſurance,

Double Inſurance.

1 Burr. 476.

19. Geo. 2. except c. 37. § 4.

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except in the cases provided for by the statute, is absolutely void: a double insurance is not void; but still the insured shall recover only one satisfaction for his loss. This requires explanation. Where a man has made a double insurance, he may * recover his loss, against which of the underwriters he pleases, but he can recover for no more than the amount of his loss. This depends upon the nature of an insurance, and the great principles of justice and good faith. An insurance is merely a contract of indemnity, in case of loss; it follows as a necessary consequence that a man shall not recover more than he has lost, or recover satisfaction greater than the injury he has sustained. This rule was wisely established, in order to prevent fraud, lest the desire of gain should occasion unfair and wilful losses. It being thus settled, that the insured shall recover but one satisfaction, and that in case of a double insurance, he may fix upon which of the underwriters he will for the payment of his loss, it is a principle of natural justice that the several insurers should all of them contribute in their several proportions, to satisfy that loss, against which they have all insured.

1 Black. Rep. 416.

* P. 281

1. Burr. 492.

These principles have been fully declared to be law in several cases, which are now to be mentioned.

Newby v. Reed. Sit. in London in Easter Vacat. 1763.

In the year 1763, it was ruled by Lord *Mansfield*, Chief Justice, and agreed to be the course of practice, that upon a double insurance though the insured is not entitled to two satisfactions; yet, upon the first action he may recover the whole sum insured, and may leave the defendant therein, to recover a rateable satisfaction from the other insurers.

1 Black. Rep. 416.

(*a*) Thus also it was determined in a subsequent case at *Guildhall*. It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge in the *West Indies*. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from *St. John's* the 17th of *December*, 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l* and has paid into court 124*l*. This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Islands*, with an exception of *American* captures: but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was * entitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool*. There was however a verdict for the plaintiff for his full demand, *with liberty for the defendant to bring an action against the Liverpool underwriters, if he thought fit.*

(*a*) Rogers v. Davis. Sittings in Mich. Vac. 17 Geo. 3. before Lord Mansfield.

* P. 282

Accordingly

Accordingly in the *Easter* term following, an action was brought for money had and received to the use of the plaintiff, who was the defendant in the last cause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the subject of the former action) 2200*l.* were insured; that on the two *Liverpool* policies 1700*l.* were insured: that the merchant was interested to the amount of 500*l.* on the ship; 300*l.* on the freight; and 1400*l.* on the cargo. That the plaintiff had paid 200*l.* loss, and 47*l.* for the costs. The question was, whether the defendant was liable to contribute any thing and what. The whole interest was 2200*l.* and the whole insurance was 3900*l.* It was insisted by the counsel for the desendant, that the insurance in *London* was an illegal re-assurance; and therefore the plaintiff might have made a good defence in an action brought against him: and if so he could not now recover over against the defendant.

Davis v. Gildart. Sittings in East. Vac. 17. Geo. 3. at Guildhall.

Lord *Mansfield*.—The question seems to be whether the insured has not two securities for the loss that has happened. If so, can there be a doubt that he may bring his action against either? It is like the case of two securities; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a *re-assurance*. But a re-assurance is a contract made by the insurer to secure himself; *and this is only a double insurance*. There was another ground taken in the cause, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Although a man, by making a double insurance, shall not be allowed to recover a double satisfaction for the same loss; yet various persons may insure various interests on the same thing, and each to the whole value (as the master for wages; * the owner for freight; one person for goods, another for bottomry) and such a contract does not fall within the idea of a double insurance. There is a full case upon this subject, and a very elaborate argument of Lord *Mansfield*, in delivering the judgment of the whole court of King's Bench, in which most of the questions relative to double insurances are clearly and decisively settled. In this cause the question was, whether the plaintiff ought to recover his whole loss, or only a half; it being objected that there was a double insurance. A verdict was found for the whole, subject to the opinion of the court upon Lord *Mansfield's* report.

1 Burr. 496.

* P. 283

Godin and others v. The London Assu. Comp. 1 Burr. 489. 1 Black. Rep. 103.

Lord *Mansfield*, in delivering the opinion of the court, began, by stating the facts, as they appeared to him at the trial.

Mr. *Meybohm* of *St. Petersburg* had dealings with Mr. *Amyand* and Company of *London*, who often sent ships from *London* to Mr. *Meybohm* at *St. Petersburg*. *Meybohm*, as appeared

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peared by the evidence, was indebted, on the balance of their accounts, to *Amyand* and Company. *Amyand* and Company ſent a ſhip, called the *Galloway*, *Stephen Barker*, maſter, to Mr. *Meybohm* at *St. Peterſburg*, to fetch certain goods. *Meybohm* ſent the goods, and promiſed to ſend the bill of lading by the next poſt, but never did. Afterwards, in *Auguſt* 1756, *Amyand* and Company got a policy of inſurance from private underwriters, for 1100*l.* on the ſhip, tackle, and goods, at and from *London* to *St. Peterſburg*, and at and from thence back again to *London*: which policy was ſigned by ſeveral private underwriters, quite different perſons from the preſent defendants; and of this ſum of 1100*l.* thus underwritten, 500*l.* was declared to be on $\frac{11}{20}$ parts of the ſhip, and the remaining 600*l.* to be on goods. Between the 26th of *Auguſt* and the 28th of *September* 1756 (both included) Mr. *Amyand* inſured 800*l.* more, with other private inſurers: and this latter inſurance was upon goods only: and was only at and from *St. Peterſburg* to *London*. On the 28th, 29th, and 30th of *October* 1756, Mr. *Amyand* inſured 900*l.* more with other private inſurers: which laſt inſurance was on goods only, at and from the *Sound* to *London*. So that the whole ſum inſured by *Amyand* and Company was 2800*l.* of which the ſum of 2300*l.* was on goods, and the remaining 500*l.* was on the ſhip. Several letters being given

*P. 284 * in evidence, it appeared that *Meybohm* wrote from *Peterſburg* on the 7th of *September* 1756 (the date of his firſt letter on this ſubject) to *Amyand* and Company; and mentioned what goods he ſhould ſend to them, referring to the invoice for particulars; and directed them to get inſurance thereon, and to place the goods and the inſurance to a particular account which he named in his letter; in which he alſo ſpecified ſome iron, which was for Mr. *Amyand*'s own account. This letter Mr. *Amyand* afterwards received (probably about the 27th of *October*) and in conſequence of it made the inſurance accordingly, upon the 28th, 29th, and 30th of the ſame *October*, as before-mentioned. *Meybohm*, having ſhipped the goods, indorſed the bill of lading to one Mr *John Tameſz* in *Moſcow* (the plaintiff in effect, in the preſent action) who on the 7th of *October* 1756, wrote to his correſpondent Mr. *Uhthoff* here in *London* to inſure theſe goods. In this letter, he deſires Mr *Uhthoff* to inſure the *whole*, that he (*Tameſz*) might be ſafe in all events; for he ſuſpected that theſe goods were intended to be conſigned by *Meybohm* to ſomebody elſe, and perhaps might be inſured by ſome other perſons. And he ſays, they were transferred to him, in conſideration of his being in advance to *Meybohm* more than their amount. This letter from Mr. *Tameſz*, with theſe directions to inſure, was received by Mr. *Uhthoff*, on the 15th of *November* 1756. Mr. *Uhthoff*, accordingly applied to the defendants,

ſendants, the *London* Aſſurance Company; and diſcloſed to them, at the ſame time, all theſe particulars: and they, upon the 16th of *November* 1756, after being thus appriſed, *that there might be another inſurance*, made the inſurance now in queſtion, for 2316*l.* on the goods at and from the *Sound* to *London*. The goods were loſt in the voyage. Mr. *Uhthoff*'s inſurance was made by the plaintiffs *Godin*, *Guion* and Company, who are inſurance brokers: and they declare that this inſurance was made by order of *Henry Uhthoff* Eſq. This declaration is indorſed upon the policy, and is dated the 18th of *November*, 1756. There is no doubt as to the value of the goods, or as to the loſs of them. It is admitted by the defendants, that the plaintiffs ought to recover half the loſs from them: but they ſay, they ought to pay *only half*, not the *whole* of the loſs. So that the only queſtion is, whether the plaintiffs are entitled, upon the circumſtances of this caſe, and upon the facts I have been ſtating, to recover the *whole loſs* from the * preſent defendants; or only the *half* of his loſs from *them*, and the remainder from the underwriters of Mr. *Amyand*'s policy. The verdict is found for the plaintiff, for the whole: but it is agreed to be ſubject to the opinion of this court, upon the queſtion I have juſt mentioned.

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Firſt, to conſider it as between the inſurer and inſured. As between them, and upon the foot of commutative juſtice merely, there is no colour why the inſurers ſhould not pay the inſured the whole: for they have received a premium for the whole riſk. Before the introduction of wagering policies, it was upon principles of convenience very wiſely eſtabliſhed, that a man ſhould not recover more than he had loſt. Inſurance was conſidered as an indemnity only, in caſe of a loſs; and therefore the inſurance ought not to exceed the loſs. This rule was calculated to prevent fraud; leſt the temptation of gain ſhould occaſion unfair and wilful loſſes. If the inſured is to receive but one ſatisfaction, natural juſtice ſays that the ſeveral inſurers ſhall all of them *contribute pro rata*, to ſatisfy that loſs, againſt which they have all inſured. No particular caſes are to be found on this head: or, at leaſt, none have been cited by the counſel on either ſide. Where a man makes a double inſurance of the ſame thing, in ſuch a manner that he can clearly recover againſt ſeveral inſurers in diſtinct policies a double ſatisfaction, the law certainly ſays that he ought not to recover doubly for the ſame loſs, but be content with one ſingle ſatisfaction for it. And if the ſame man really and for his own proper account inſures the ſame goods doubly, though both inſurances be not made in his own name, but one or both of them in the name of another perſon, yet that is juſt the ſame thing; for the ſame perſon is to have the benefit of both policies. And if the whole ſhould be recovered from one, he ought to ſtand in the place of the inſured, to receive contribution from the other, who was

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equally liable to pay the whole: But in this caſe if *Tameſz* was not to have the benefit of both policies in all events, then it can never be conſidered as a double policy.

It has been ſaid, that the indorſement of the bills of lading transferred *Meybohm's* intereſt in all policies, by which the cargo aſſigned was inſured; and therefore *Tameſz* has a right to Mr. *Amyand's* policy: and that *Tameſz*, being the aſſignee of
* P. 286 * *Meybohm*, is the *ceſtuy qui truſt* of it, and may recover the money inſured; and even that he may bring trover, or detinue, for the very policy itſelf: and it is urged from hence, that he either will, or may, have a double ſatisfaction for the ſame loſs.

But allowing that, by the indorſement of the bills of lading and aſſigning the cargo to *Tameſz*, he ſtands in the place of *Meybohm* in reſpect of his inſurances; yet Mr. *Amyand* has an intereſt of his own, and had actually inſured the ſhip and goods, to the amount of 1900*l.* (upon both together) prior to any directions or intimation received from Mr. *Meybohm*, to inſure for him. Various people may inſure various intereſts on the ſame bottom: (as one perſon for goods; another for bottomry, *&c.*) And here, Mr. *Amyand* had an intereſt of his own, diſtinct from that of Mr. *Meybohm*: he had a lien upon theſe very goods as a factor to whom a balance was due. And he had the ſole intereſt in the ſhip, which was a part of the things inſured by him. It is far from appearing, that even his laſt inſurance (in *October*) was made on the account of *Meybohm*, or as agent for him. So far from it, Mr. *Amyand* inſiſts upon it for his own benefit, (as he expreſsly declared at the trial) and abſolutely refuſes to give it up, or to ſuffer his name to be uſed by the plaintiff; though he was a witneſs for the defendants, and was produced by them, and inclined to ſerve them. So that the foundation of this argument, urged by the defendant's counſel, fails them; and there is, in reality, nothing to ſupport it. But even ſuppoſing that Mr. *Amyand* had made his inſurance, not upon his own account, but as agent or factor for Mr. *Meybohm*, and upon the account of *Meybohm*; yet even then *Tameſz* can never come againſt *Amyand's* underwriters, or come at *Amyand's* policy, to his own uſe. For *Amyand*, the factor of *Meybohm*, has poſſeſſion of the policy, and appears to have been a creditor of *Meybohm* upon the balance of accounts between them, at the time when he made the inſurance: and I take it to be now a ſettled point, "that a factor, to whom a balance is due, has a "lien upon all goods of his principal, ſo long as they remain in "his poſſeſſion." *Kruzer* and others v. *Wilcox* and others, was a caſe in Chancery upon this point. It came on firſt before Sir *John Strange*, then Maſter of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ſhip or cargo, and
P. 287 * reſerved all further directions till after the maſter's report. It

came

came on again, afterwards, for further directions, after the maſter's report, before the Lord Chancellor, who was attended by four eminent merchants, whom he interrogated publickly. After which he took time to conſider of it; and on the firſt of *February* 1755, decreed, "that the factor has a lien on goods "conſigned to him; not only for incident charges, but as an "item of mutual account for the general balance due to him ſo "long as he retains the poſſeſſion. But if he part with the poſ-"ſeſſion of the goods, he parts with his lien becauſe it cannot "then be retained as an item for the general account." There was another caſe, in the ſame court, of *Gardiner* v. *Coleman*, a few months after; in which the former caſe, determined as I have mentioned, was conſidered as a point ſettled; and this latter caſe of *Gardiner* v *Coleman* was decreed agreeably to it. So that Mr. *Amyand*, even conſidered as factor or agent to *Meybohm*, and as making the inſurance upon *Meybohm's* account, is yet entitled to retain the policy; *Meybohm* being indebted to him upon the balance of the account between them; and he has a lien upon the policy, whilſt it continues in his poſſeſſion: Therefore, even in this view of the caſe, Mr. *Tameſz* muſt firſt have paid to *Amyand* the balance of his (*Amyand's*) account, before he could have gotten that policy out of *Amyand's* hands; and conſequently, Mr. *Tameſz* was very far from being entitled to the benefit of it as *a ceſtuy qui truſt*, abſolutely and entirely.

But if the queſtion, "whether *Tameſz* could take benefit of Mr. *Amyand's* policy," were doubtful; yet here, *Tameſz* inſured the goods with the defendants, expreſsly under the declaration of his ſuſpicion, that there might have been a former conſignation, and ſome former inſurance made upon the goods by ſome other perſon: but he deſired to inſure the whole for his own ſecurity; and to this the defendants agreed, and took the whole premium. Mr. *Amyand* inſiſted upon his right to the whole benefit of his own policy, when he was examined as a witneſs; and is now litigating it in Chancery. It would neither be juſt or reaſonable, that *Tameſz* ſhould only recover half of his loſs from the defendants, and be turned round for the other half, to the uncertain event of a long and expenſive litigation. I do not believe there ever will or can be a recovery * by *Tameſz*, or thoſe who ſhall ſtand in his place, againſt *Amyand's* underwriters. However, if thoſe underwriters are liable to contribute at all, the contribution ought to be among the ſeveral inſurers themſelves: but *Tameſz*, the inſured, has a right to recover his whole loſs from the defendants, upon the policy now in queſtion, by which they are bound to pay the whole. For though here be two inſurances, yet it is not a double inſurance: to call it ſo is only confounding terms. If *Tameſz* could recover againſt both ſets of inſurers, yet he cer-

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tainly could not recover againſt the underwriters of *Amyand's* policy, without ſome expence; nor without alſo firſt paying and re-imburſing to Mr. *Amyand* the premium he paid, and alſo his charges. This is by no means within the idea of a double inſurance. Two perſons may inſure two different intereſts; each to the whole value; as the maſter, for wages; the owner, for freight, &c. But a double inſurance, is where the ſame man is to receive two ſums inſtead of one, or the ſame ſum twice over, for the ſome loſs, by reaſon of his having made two inſurances upon the ſame goods, or the ſame ſhip. Mr. *Tameſz* is entitled to receive the whole from the defendants, upon their policy: whatever ſhall become of Mr. *Amyand's* policy: and they will have a right in caſe he can claim any thing under Mr. *Amyand's* policy, to ſtand in his place, for a contribution to be paid by the other underwriters to them. But ſtill they are certainly obliged to pay the whole to him. Therefore upon theſe grounds and principles, in every light in which the caſe can be put, we are all of us clearly of opinion, that the verdict is right, as it now ſtands for the whole; and that the *poſtea* muſt be delivered to the plaintiff.

In the courſe of what has been ſaid upon double inſurance, no notice has been taken of the laws of foreign ſtates reſpecting that point: the reaſon of this ſilence is the great contrariety to be found in their laws upon the ſubject; it being almoſt impoſſible to mention two countries, whoſe regulations, as to this matter, are ſimilar. In one the contract is abſolutely void, and a forfeiture enſues; in others, if the firſt policy amount to the value of the effects laden, the other inſurers ſhall withdraw their inſurance, retaining one half *per cent.* and in ſome other countries, the double inſurance is merely void, without any forfeiture being incurred. When there is ſuch a diverſity in the ordinances upon the ſubject, it ſeemed needleſs to enter into them, eſpecially as the law of *England* with reſpect to double inſurance is ſo clear, and ſo well founded in reaſon and natural juſtice, as to require no illuſtration or confirmation from the laws of any other country.

Ord. of Middleb. 2 Mag. p. 77. Ord. of Fran. and Stockh. 1 Mag. 172. 267. Ord of Bilboa, 2 Mag. p. 411.

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Having, in this and the five preceding chapters, treated of thoſe circumſtances, by which the contract of inſurance is rendered void from its commencement, on account of ſome radical defect, which prevents the policy from ever having any operation at all: and having, in the courſe of that enquiry, been led into a variety of diſcuſſion, involving it in a very material part of the law of inſurance: we ſhall proceed to ſhew in what caſes the policy, although not void *ab initio*, is rendered of no effect, becauſe the inſured has not himſelf fully complied with thoſe conditions, which he has either *expreſsly* or *tacitly*, from the nature of his contract, undertaken to perform. It was indeed obſerved in the firſt chapter of this work, that although the policy is not ſubſcribed by the inſured, yet there are certain con-

Vide ante p. 1.

conditions to be performed on his part, with as much good faith and integrity as if his name appeared at the foot of the policy: otherwiſe it is a dead letter, and he can never recover an indemnity for any loſs, which he may happen to ſuſtain. CHAP XVI.

*CHAPTER THE SIXTEENTH. *P. 290

Of Changing the Ship.

OF thoſe cauſes, which will operate as a bar to the inſured's recovering upon a policy of inſurance, againſt the underwriter, the firſt to be mentioned is that of changing the ſhip; or, as it has commonly been called, changing the bottom. This will require but very little diſcuſſion. We formerly ſaid, that except in ſome ſpecial caſes of inſurances upon *ſhip or ſhips*, it was eſſentially requiſite to render a policy of inſurance effectual, that the name of the ſhip, on which the riſk was to be run, ſhould be inſerted. That being done, it follows as an implied condition that the inſured ſhall neither ſubſtitute another ſhip for that mentioned in the policy before the voyage commences, in which caſe there would be no contract at all: nor during the courſe of the voyage remove the property inſured to another ſhip, without the conſent of the underwriter, or without being impelled by a caſe of unavoidable neceſſity. If he do, the implied condition is broken, and he cannot recover a ſatisfaction, in caſe of a loſs, from the inſurer; becauſe the policy was upon goods, on board a particular ſhip, or upon the ſhip itſelf; and it becomes a material conſideration in a contract of inſurance, upon what veſſel the riſk is to run; ſince the one may be much ſtronger, and more able to reſiſt the perils of the ſea; or by its ſwift ſailing, much better able to eſcape from the purſuit of an enemy, than the other. Vide ante c. 1

Malyne, it is true, in his *Lex Mercatoria*, appears to be of a different opinion; for he ſays, "It ſometimes happens, that "upon ſome ſpecial conſideration, this clauſe forbidding the "transferring of goods from one ſhip to another is inſerted in "policies of aſſurance; becauſe in time of hoſtility or war "between princes, it might be unladen, in ſuch ſhips of thoſe "contending princes, by which the adventure would be en-"*creaſed. But according to the uſual inſurances which are "made generally without an exception, the aſſurer is liable "thereunto; for it is underſtood, that the maſter of a ſhip "without ſome good and accidental cauſe, wold not put the, "goods from one ſhip to another, but would deliver them, "according to the charter-party, at the appointed place." Mal. Lex Merc. 118. *P. 291

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The reaſon given by *Malyne*, in ſupport of his poſition, is by no means ſatisfactory, nor is it well founded in point of experience: neither has he adduced a ſingle authority to corroborate the opinion advanced. Indeed, the whole current of authority turns the other way: at leaſt, as far as I have been able to trace it.

Molloy, l. 2. c. 7. ſ. 11.

Molloy has ſaid, that if goods are inſured in ſuch a ſhip, and afterwards in the voyage ſhe becomes leaky and crazy, and the ſupercargo and maſter, by conſent, become freighters of another veſſel for the ſafe delivery of the goods; and then after ſhe is loaded, the ſecond veſſel miſcarries, the aſſurers are diſcharged. It is true, the ſentence proceeds thus: "If theſe "words be inſerted, namely, *the goods laden to be tranſported "and delivered at ſuch place by the ſaid ſhip, or by any other ſhip "or veſſel, until they be ſafely landed*, the inſurers muſt anſwer "the misfortune." But this does not at all affect the general rule before laid down; for it only goes to ſhew that, which is not denied, that the parties may take a caſe out of the general rule of law, by a ſpecial agreement: and the exception proves the truth of the firſt propoſition. Beſides, in ſuch a caſe, it ſhould ſeem that the ſhip, in which the goods are laden, ought not to be changed, but upon neceſſity.

Roccus de Aſſecurat. Not. 28.

This opinion is confirmed by foreign writers. "Merces ſi "eadem navigatione transferantur de unâ navi in aliam, et "ſi noviſſima navis ubi merces transfuſæ fuerunt, deperdatur, "tunc eſt inſpicienda forma aſſecurationis, in quâ ſi fuit dictum "quod aſſecurentur merces, *quæ ſunt in tali navi*, tunc *aſſecu-"rator non tenetur*, eo quod mentionem fecit in aſſecuratione "de tali navi. Et ratio eſt, quia non par eſt ratio aſſecura-"tionis, *quando merces devehuntur in una navi, et quando in* * P. 292 "*altera*; imo ſolet id principaliter conſiderari inter ipſos aſſe-Santer. de Aſſecurat. pt 3. n. 35. Stracca gloſ. 8. n. 10. "curatores, cum *una navis ſit magis fortis quam alia.*" *Roccus* is corroborated by ſeveral learned writers upon this branch of juriſprudence.

In the law of *England*, there is only one caſe to be met with in print upon the ſubject; and that is not expreſsly in point to the preſent enquiry, although it ſeems to decide it. It was a caſe which came on at *Guildhall* before Lord Chief Juſtice *Lee*. The plaintiff had inſured intereſt or no intereſt on *any ſhip* he ſhould come in from *Virginia* to *London*, beginning the adven-Dick v. Barrell. 2 Stra 1248. ture *on his embarking* on board ſuch ſhip; the money to be paid though his perſon ſhould eſcape, or the ſhip be retaken. He embarked on the *Speedwell*; but ſhe ſpringing a leak at ſea he went on board the *Friendſhip*, and arrived ſafe at *London*; but the *Speedwell* was taken after he left her. And now in an action againſt the underwriter, he was held liable; for the inſurance is on the ſhip the plaintiff ſet out in: *and had that got ſafe home, and the other been loſt*, the plaintiff could not have recovered

recovered upon the ground of having removed his perſon into that ſhip in the middle of the voyage.

From this caſe it appears, that although no ſhip was named in the policy, yet the moment the ſhip was aſcertained by the embarkation of the inſured, the contract was at an end, provided the ſecond ſhip had been loſt; for ſo the words in *Italicks* expreſsly import. *A fortiori*, therefore, the inſured could not be entitled to recover, upon a change of the bottom, when the name of the veſſel is expreſsly mentioned in the very inſtrument by which the contract is effected. And although the inſured notwithſtanding the change of bottom, recovered in the caſe cited from *Strange*; it may be accounted for in two ways, conſiſtent with the doctrine advanced in this chapter. In the firſt place, it was a gaming policy, intereſt or no intereſt; and the plaintiff was entitled to recover the moment the ſhip was taken, although he might perhaps not be intereſted at all: or perhaps the effects inſured might be left in the firſt ſhip, although the plaintiff removed his perſon; in which caſe, even at this day, upon a fair *bonâ fide* policy he would be entitled to recover from the underwriters a ſatisfaction for the loſs he had ſuſtained.

* The general doctrine relative to changing the bottom of the ſhip was alluded to by Lord *Mansfield*, when delivering the opinion of the court in the caſe of *Pelly* againſt the *Royal Exchange* Aſſurance company, which has already been fully reported in a preceding chapter, "One objection," ſaid his Lordſhip, "was formed by comparing this caſe to that of changing the ſhip "or bottom, on board of which goods are inſured: *which the "inſured have no right to do* (*a*) For there the identical ſhip "is eſſential; *that* is the thing inſured. But that caſe is not "like the preſent."

* P. 293

Vide ante c. 2. p. 41. 1 Burr. 351.

From this paſſage it is evident, that Lord *Mansfield* intended to confirm the principle advanced in this chapter, namely, that when an inſurance is made on a ſpecific ſhip, and the inſured not being impelled by any neceſſity, without the conſent of the underwriter, changes the ſhip in the courſe of the voyage, he has not kept his part of the contract, and cannot recover againſt the underwriter.

(*a*) This is to be taken as a rule, ſubject to the exception of inevitable or urgent neceſſity: for it has been held, that the owners of goods inſured, by the act of ſhifting the goods from one ſhip to another, do not preclude themſelves from recovering an average loſs ariſing from the capture of the ſecond ſhip, if they act from neceſſity, and for the benefit of all concerned. See *Plantamour* v. *Staples*, 1 Term. R. 611. note (a) and ante chap. 1.

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* CHAPTER THE SEVENTEENTH.

* P. 294

Of Deviation.

DEVIATION, in marine insurances, is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specifick voyage insured. Whenever a deviation of this kind takes place, the voyage is determined; and the underwriters are discharged from any responsibility. It is necessary, as we have seen, to insert in every policy of insurance, the place of the ship's departure, and also of her destination. Hence it is an implied condition to be performed on the part of the insured, that the ship shall pursue the most direct course, of which the nature of things will admit, to arrive at the destined port. If this be not done; if there be no special agreement to allow the ship to go to certain places out of the usual track; or if there be no just cause assigned for such a deviation; it is but just and reasonable, that the underwriter should no longer be bound by his contract, the insurer having failed to comply with the terms, on which the policy was made For if the voyage be changed after the departure of the ship, it becomes a different voyage, and not that, against which the insurer has undertaken to indemnify: (which is the true objection to a deviation) the risk may be ten times greater, which probably the insurer would not have run at all, or at least would not, without a larger premium. Nor is it at all material, whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable, for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference, whether the insured was, or was not, consenting to the deviation.

Vide ante c. 1.

Roccus Not. 52.

Doug. Rep. 278.

These principles have been established by many decisions in the various courts of *Westminster Hall*, and also by a solemn determination in the House of Lords.

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Fox v. Black. Exeter assizes 1767, before Mr Justice Yates.

* The plaintiff was a shipper of goods in a vessel bound from *Dartmouth* to *Liverpool*: the ship sailed from *Dartmouth*, and put into *Loo*; a place *she must of necessity pass by*, in the course of the insured voyage. But as she had no liberty given her by the policy to go into *Loo*, and although no accident befel her in going into, or coming out of *Loo*, (for she was lost after she got out to sea again) yet Mr. Justice *Yates* held that this was a deviation, and a verdict was accordingly found for the underwriters.

In

(*a*) In another caſe, an action was brought upon a policy on goods and other merchandizes loaded on board the ſhip, called the *Charming Nancy*, from *Dunkirk* to *Leghorn*. The ſhip came to *Dover* in her way to procure a *Mediterranean* paſs; and was afterwards loſt.

(*a*) Townſon v. Guyon, before Lord Mansfield.

Lord *Mansfield* was of opinion, that the calling at *Dover* was a deviation; and the plaintiff was nonſuited.

It was alſo held by Lord Chief Juſtice *Lee*, that if the maſter of a veſſel put into a port not uſual, or ſtay an unuſual time, it is a deviation, and diſcharges the inſurer.

The next caſe to be reported underwent a variety of diſcuſſion in the ſeveral courts in *Scotland*; and in all of them, judgment was given againſt the underwriters: but upon an appeal to the Houſe of Lords, the various decrees of the courts below were reverſed, agreeably to thoſe principles adduced in the beginning of this chapter, and, which have been uniformly admitted as ſound law.

Elliot and Others v. Wilſon and Co. 7 Brown's Parl. Caſes, P. 459.

The harbour of *Carron*, ſituate near the head of the *Frith* of *Forth*, is chiefly reſorted to by ſhips in the ſervice of the *Carron* Company, who have a great iron work and conſiderable collieries in the neighbourhood. From thence veſſels, intended principally to convey the manufactures of the company, their coals, and ſuch goods as may be offered them on freight, ſail periodically for *Hull*, and other places on the *Eaſtern* coaſt of *England*. This is a coaſting or carrying trade, the veſſels in going down the *Frith* touching at different places to take in additional loading, or to diſcharge part of what they have received at places higher in the river. Particularly it is uſual for theſe veſſels to call at *Borrowſtowneſs* and *Leith*, and at *Morriſon's Haven*, a port ſix miles farther down the *Frith*, and on the ſame ſide with *Leith* in the bay of *Preſtonpans*. In *February* 1774, the reſpondents had occaſion to ſhip fourteen hogſheads of tobacco on board one of theſe veſſels for *Hull*; and deſiring to inſure them, gave the following inſtructions in writing to *Hamilton* and *Bogle*, inſurance brokers in *Glaſgow*: "Pleaſe to inſure for "our account by the *Kingſton*, *George Finlay*, maſter, from "*Carron to Hull, with liberty to call as uſual*, fourteen hogſheads "of tobacco;" and theſe inſtructions were entered in the broker's books for the peruſal of the underwriters, as is the practice at *Glaſgow*. Upon the 9th of *February*, the appellants underwrote a policy of inſurance in theſe terms; "beginning "the adventure of the ſaid tobacco, at and from the loading "thereof on board the ſaid ſhip *Kingſton*, at *Carron* wharf, and "to continue and endure until ſaid *Kingſton* (*being allowed a* "*liberty to call at Leith*) ſhall arrive at *Hull*, and there be ſafely "delivered." The reſpondents were not privy to the allowance to call at *Leith*, being thus ſubſtituted in the policy for the more general term, *as uſual*, mentioned in the inſtructions to the

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the broker. The premium agreed on was 1*l.* 5*s.* *per cent.* a rate equal at leaſt, if not higher than was uſual to be given in the voyage, in caſes where it was underſtood, or expreſſed in the policy, that the veſſel might touch at the cuſtomary ports. And in particular, ſome of theſe appellants in *February* 1772, underwrote a policy upon this very veſſel, and for the ſame voyage, with liberty to call at *Leith* and *Morriſon's Haven*, at a premium of one *per cent.* only. The veſſel thus inſured had ſailed from *Carron* five days before the date of the policy, that is, on the 4th of *February* 1774, it did not call or touch at *Leith*, *but put into Marriſon's Haven*; ſet ſail from thence on the 9th, got ſafe into the direct courſe from *Carron* to *Hull*, cleared the *Frith* of *Forth*, and proceeded with a fair wind, till on the evening of the 10th the veſſel, being overtaken by a ſtorm at *Holy Iſland*, on the coaſt of *Northumberland*, was wrecked and the cargo totally loſt. All theſe were facts admitted, nor was it alleged by the appellants, that the ſhip received the ſmalleſt damage, in going into, or coming out of *Morriſon's Haven*. Intelligence of this misfortune reached *Glaſgow* on the 14th of *February*, when the reſpondents for the firſt time ſaw the policy of inſurance, or underſtood that it differed in terms from their

P. 297 * inſtructions to the broker, in whoſe hands it remained. It did not, however, occur to them, that this ſlight variation would afford a pretext to the underwriters for refuſing payment; nor does it ſeem to have then occurred to thoſe gentlemen, who wrote immediately to the reſpondents, deſiring they would requeſt the *Carron* Company to give the neceſſary orders for preſerving the tobacco, and forwarding it to *Hull*, promiſing to contribute towards the expences, ſo far as they were intereſted. Upon the 24th of *February*, however the appellants, in an inſtrument drawn by a public notary, proteſted againſt the ſhip's having gone into *Morriſon's Haven*, as a deviation from the terms of the policy, which only contained a liberty to call at *Leith*; and abſolutely refuſed payment of the loſs. On this refuſal, the reſpondents brought their action againſt the appellants in the court of Admiralty in *Scotland*, the only competent court for determing queſtions about inſurances, and other maritime affairs in that country, in the firſt inſtance. The appellants put in their defence, which was followed by other pleadings, in *January*, 1775, the Judge Admiral pronounced the following interlocutor (or decree:) "Having conſidered the whole cir-
"cumſtances of this caſe, and in particular that it is not alleged
"by the defenders, that the purſuers were in the knowledge of
"the ſhip the *Kingſton* being intended to put into *Morriſon's*
"*Haven*, he repels the defence pleaded by the defenders."
The appellants reclaimed againſt this interlocutor, (petitioned for a review of the ſentence) and anſwers being put into their petition,

petition, the Judge Admiral, becauſe they ſet forth, and ſeemed to found on converſations between them and the brokers, at the time of underwriting or ſettling the terms of the policy, allowed them to bring proof of what paſſed at and previous to making the inſurance. But the appellants preſented a ſecond petition, declining to go into any proof, inſiſting that the cauſe turned ſingly upon the words of the policy, and demanding judgment on the abſtract queſtion, whether the veſſel touching at *Morriſon's Haven*, when not allowed by the policy, diſcharged the underwriters? Whereupon the Judge again decreed in favour of the reſpondents. The appellants then ſued out a writ of ſuſpenſion from the Court of Seſſion, of theſe ſentences of the Judge Admiral, and after the uſual preliminary ſtep of procedure before the Lord Ordinary, the cauſe being reported to the whole bench of Lords, their Lordſhips having before them * the opinions of ſeveral of the moſt eminent merchants both in *England* and *Scotland*, gave judgment for the reſpondents, in the month of *January* 1776, in the following terms: "Having adviſed informations, *hinc*, *inde*, and conſidered the "policy of inſurance and the whole circumſtances of the caſe, "the Lords repel the reaſons of ſuſpenſion, find the letters "orderly proceeded," (that is, that the appellants were obliged to pay the ſums underwritten, in terms of the Judge admiral's decree) and their Lordſhips decree accordingly. The appellants having alſo reclaimed againſt this interlocutor, it was in *March* 1776, finally confirmed. From theſe ſeveral decrees the preſent appeal was brought; and the Houſe of Lords were of opinion, that a wilful deviation from the due courſe of the inſured voyage is in all caſes a determination of the policy; that from that moment, the engagement between the inſurers and inſured is at an end; that it is immaterial from what cauſe, or at what place, a ſubſequent loſs ariſes, the inſurers being in no caſe anſwerable for it: that the going into *Morriſon's Haven* was a wilful deviation from the due courſe of a voyage from *Carron* to *Hull:* that though it may be true, as contended on the part of the reſpondents, that ſhips ſailing through the *Frith* of *Forth* have ſometimes been permitted by the terms of a policy, underwritten at the ſame premium as the preſent, to go into that port, it could not avail in the preſent caſe, ſince the policy in queſtion had given no ſuch permiſſion, It was therefore ORDERED AND ADJUDGED that the interlocutors complained of ſhould be reverſed.

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Theſe principles being once eſtabliſhed it follows, as a neceſſary conſequence, that however ſhort the time of deviation may be, if only for a ſingle night, or even for an hour, the underwriter is equally diſcharged, as if there had been a deviation for weeks or months: for the condition being once broken, no ſubſequent act can ever make it good.

The

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The ſhip *George* was bound from *Cork* to *Jamaica* with a convoy in the courſe of a war: the captain, in concert with two other veſſels, took advantage of the night, and being ſhips of force, cruiſed, and thereby deviated out of the direct courſe of their voyage, in hopes of meeting with a prize. Lord *Camden* clearly held, and a ſpecial jury of merchants, agreeably to his directions, determined, that from the moment the *George* deſerted or deviated from the *direct voyage* to *Jamaica*, the policy was diſcharged.

Cock. v. Townſon. C. B. before Lord Camden, Ch. Juſt.

* P. 299

In a modern caſe, however, it ſeemed to be the general opinion of Lord *Mansfield*, and a ſpecial jury; and was ſworn to be the uſage by ſeveral witneſſes, that if a merchant ſhip carry letters of marque, ſhe may *chaſe* an enemy, though ſhe may not *cruiſe*, without being deemed guilty of a deviation.

Jolly v. Walker, at Guildhall. Eaſt. Vac. 1781.

On an inſurance of the *Mary* at and from *London* to *Cork* and the *Weſt Indies*, the queſtion was whether a ſhip, having letters of marque, could *chaſe* an enemy's ſhip, without being ſaid to have deviated. The facts were, that in the night the *Mary* had deſcried a *Spaniſh* ſail; and after chaſing loſt ſight of her for ſix hours till the morning, when they engaged. The *Mary* did not make a prize of the *Spaniſh* ſail, but ſhe proceeded on her voyage, and was afterwards captured. It was agreed on all hands, that a ſhip, in ſuch circumſtances, might not cruiſe; and ſeveral witneſſes ſpoke to the uſage and practice of ſhips, which carried letters of marque, chaſing an enemy. It was admitted on the part of the inſurers, that if an enemy came in the way, the ſhip muſt defend or engage; but contended, that if the letter of marque loſt ſight of the enemy, that it was no longer chaſing, but cruiſing. Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs; thereby deciding the queſtion in the affirmative.

Roccus. n. 32.

But though the conſequences of a voluntary deviation are thus fatal to the validity of the contract of inſurance, yet wherever the deviation ariſes from neceſſity and a juſt cauſe, the underwriter ſtill remains liable, although the courſe of the voyage is altered.

Elton v. Brogden. 2 Stra. 1264. Vide ante p. 87.

This rule is illuſtrated by the following caſe. The ſhip *Mediterranean* went out in the merchants ſervice with a letter of marque, and bound from *Briſtol* to *Newfoundland*, inſured by the defendant. In her voyage ſhe took a prize, and returned with it to *Briſtol*, and received back a proportionable part of the premium. Then another policy was made, and the ſhip ſet out, with expreſs orders from the owners, that if another prize

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* was taken, the captain ſhould put ſome hands on board ſuch prize, and ſent her to *Briſtol*; but that the ſhip in queſtion ſhould proceed with the merchants goods. Another prize was taken in the due courſe of the voyage, and the captain gave orders to ſome of the crew to carry her to *Briſtol*, and deſigned

to

to go on to *Newfoundland*: but the crew oppoſed him, and inſiſted he ſhould go back, though he acquainted them with his orders; upon which he was forced to ſubmit, and on his return his own ſhip was taken, but the prize got in ſafe. And now in an action againſt the underwriters, it was inſiſted, that this was ſuch a deviation, as diſcharged them. But the court and jury held, that this was excuſed by the force upon the maſter, which he could not reſiſt; and therefore fell within the excuſe of neceſſity, which had always been allowed. So the plaintiff had a verdict for the ſum inſured.

The general writers upon this ſubject have enumerated the various circumſtances, which will operate as a juſtification to the inſured, for leaving the direct track of the voyage, upon the ground of neceſſity and reaſonable cauſe: ſuch as to repair his veſſel, to eſcape from an impending ſtorm, or to avoid an enemy. In our reports of deciſions in the *Engliſh* courts of juſtice, we find inſtances of all theſe various excuſes being allowed as ſufficient to juſtify a deviation; and alſo another ſpecies of excuſe, namely, to meet a convoy, which, indeed, is nearly connected with that of avoiding an enemy. I ſhall rank all the caſes, which apply to this branch of our enquiry, under theſe ſeveral diviſions.

Roccus 52 Santer de Aſſecur. part 3. n. 52.

The firſt ground of neceſſity which juſtifies a deviation, is that of going into port to repair. If a ſhip is decayed, and goes to the neareſt place to refit, it is no deviation; becauſe it is for the general intereſt of all concerned, and conſequently for that of the underwriters, that the ſhip ſhould be put in a proper condition, capable of performing the voyage.

The ſhip *Eyles*, being at *Bengal* in the year 1732, the owner employed a Mr. *Halhead* to inſure this ſhip in the *London* Inſurance Office for 500*l.* the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till the ſaid ſhip ſhould arrive at *London*; and that it ſhould be * lawful for the ſaid ſhip, in the ſaid voyage, to ſtay at any ports or places without prejudice. The *Eyles* came to *Fort St. George* in *February*, 1733, in her way to *England*; but being leaky, and in very bad condition, upon the unanimous advice of the governor, council, commanders of ſhips, *&c. ſhe ſailed for Bengal to be refitted*; and after being ſheathed, in her return upon her homeward-bound voyage, ſhe ſtruck upon the *Engilee Sands*, and was loſt. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the proper place to refit, and that the ſhip went thither for that reaſon; that this was a voyage of neceſſity, and not a trading voyage, for ſhe took nothing on board but water, proviſions, and ballaſt. When this cauſe came on to be heard before Lord Chancellor *Hardwicke*, he refuſed to decide it, but directed an iſſue at law. His Lordſhip, however, obſerved, that the general prin-

Motteux and Others v. the London Aſſurance Company. 1 Atk. 545.

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ciples

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ciples laid down by the plaintiff's counſel were right, as ſtreſs of weather, and the danger of proceeding on a voyage, when a ſhip is in a decayed condition: and in ſuch a caſe, if ſhe went to the neareſt place, he ſhould conſider it equally the ſame, as if ſhe had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumſtance, that the governor ordered the lading to be taken out, to ſhew the neceſſity of the ſhip's being repaired; but there is not a ſyllable of proof why ſhe might not have been equally repaired at *Fort St. George*. His lordſhip therefore directed an iſſue to try, whether the loſs in *July*, 1733, was a loſs during the voyage and according to the adventure which was agreed upon, or intended to be inſured. On a trial at *Guildhall* in the court of Common Pleas, the jury found in favour of the plaintiff.

Guibert v. Readſhaw Sitt. in Lond. Hil. Vac. 1781.

This was an action on a policy of inſurance on the *Nancy*, at and from *La Rochelle* to the coaſt of *Africa*, during her ſtay and trade thereon, and at and from thence to her port of diſcharge in the iſland of *St. Domingo*. Three days after the ſhip ſailed from *La Rochelle*, ſhe met with a gale, which ſtrained her ſeams, and ſplit her mizen-yard and rigging. The crew came in a body to the captain, deſiring for the preſervation of their lives to make to ſome port to repair. The veſſel being a new * one, and the captain finding that ſhe had two little ballaſt, complied, and put into *Liſbon*, the neareſt port; from whence after taking in 500 rolls of tobacco as ballaſt, he proceeded to the coaſt of *Guinea*, traded there, and the ſhip was afterwards captured in the ſight of *St. Domingo*, before ſhe arrived. The defendant inſiſted, that going into *Liſbon* was a deviation, and called witneſſes, who were of opinion, that in the latitude in which the ſtorm happened, there could be no difficulty in repairing all the damage the veſſel was deſcribed to have received even in the worſt weather, as ſhe might have proceeded to the coaſt of *Africa*, and repaired there at a leſs expence; and that a ſhip, loaded like that in queſtion, could not need additional ballaſt. On the croſs examination, it came out that the premium would not have varied, had the voyage been by the way of *Liſbon*.

* P. 302

Lord *Mansfield* left it to the jury, on the ground of neceſſity to go to *Liſbon* for repairs. He ſaid, that much depended upon the circumſtance, that no additional premium would have been required for liberty to touch there. If the jury believed the evidence of the witneſſes, they muſt find for the plaintiff, for that the whole of the defendant's caſe reſted merely upon ſurmiſe and ſuſpicions alone. The plaintiff accordingly had a verdict.

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The next excuſe for leaving the direct courſe is ſtreſs of weather. Upon this point the rule is this, that wherever a ſhip, in order to eſcape a ſtorm, goes out of the direct courſe; or when, in the due courſe of the voyage, is driven out of it by ſtreſs of weather, this is no deviation; becauſe it was occaſioned by the act of God, which, by a maxim of law, is ſaid to work an injury to no man. It has alſo been held, that if a ſtorm drive a ſhip out of the courſe of her voyage, and ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven. This rule is exemplified by the following caſe.

It an action on a policy of inſurance of the ſhip *Atlantic*, warranted to ſail with convoy from *England* to *St Kitt's* on or before the firſt of *Auguſt*; the queſtion was, whether there had been a deviation. The ſhip was ſeparated from her convoy by * a ſtorm. The captain being examined, ſaid, his object, after his ſeparation, invariably was to gain *St. Kitt's*, or to fall in with the convoy. That the ſhip was taken by an *American* privateer in lat. 34. lon. 59. Several captains were examined, who ſwore, that they would have taken the ſame courſe to get to *St. Kitt's*, or regain the fleet. Harrington v. Halkeld. Sitt. in Lond. Mich. V. c. 1778. * P. 303

Lord *Mansfield*.—The ſingle queſtion is, whether the captain was taken as he was going to *St. Kitt's*. If he was not, he is perjured. The account he gives is, that on the 28th of *July* there was a ſtorm, which ſeparated the fleet: that he did all he could to get to *St. Kitt's*, and to direct his courſe ſo as to meet the convoy croſſing. The captain goes on the ground not to reaſon, but to obey, be the conſequence what it might. He knows nothing of the inſurance: he ſays to himſelf, If I obey, I am doing right. As to the proteſt, I do not ſee that it contradicts the captain's evidence. Other captains have looked at the log-book or journal; and they ſay, they would have held the ſame courſe.

Verdict for the plaintiff.

Upon the ſubject of a departure from the courſe of the voyage, on account of ſtreſs of weather, another very important point has lately been determined, though the ſame principle runs though all the caſes, that whatever happens by the act of God, ſhall not be imputed to man. On this ground it has been held, that if a ſhip be driven out of her port of loading by ſtreſs of weather into another, and then does the beſt ſhe can to get to her port of deſtination, it ſhall not be deemed a deviation, though ſhe do not return to the port from whence ſhe was driven.

The caſe here alluded to was an action upon the caſe againſt the defendant, for not having inſured a ſhip and cargo, purſuant to the orders of the plaintiff, by means whereof he was damnified, Delany v. Stoddart. 1 Term. Rep. p. 22.

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fied, the ſhip having been loſt (*a*). It was tried before Mr. * Juſtice *Buller* at *Guildhall*, at the ſittings after *Trinity* Term 1785; and a verdict was found for the plaintiff.

* P. 304

Upon

(*a*) It may be proper to explain the nature of this action. When a man undertakes, either by an implied or expreſs promiſe, to do a thing for another, and he neglects to do it, the law gives the perſon injured an action for the non-feaſance. This is the caſe in queſtion with reſpect to inſurance; and the only difference between this action, and that on a policy againſt the underwriters, is in point of form; for the plaintiff in this action is entitled to recover the exact ſum he ordered to be inſured: and the defendant is entitled to every benefit, of which the underwriter could have taken advantage, ſuch as fraud, deviation, non-compliance with warranty, &c.

Smith v. Laſcelles 2 Term Rep. 187.

In a very late caſe, the whole law upon this action was very fully and accurately ſtated by Mr. Juſtice *Buller*, and aſſented to by the whole Court; and upon this occaſion that learned judge mentioned the three inſtances in which ſuch an order to inſure muſt be obeyed, otherwiſe this action will lie. Firſt, where a merchant abroad has effects in the hands of his correſpondent here, he has a right to expect that he will obey an order to inſure, becauſe he is entitled to call his money out of the other's hands when and in what manner he pleaſes. The ſecond claſs of caſes is, where the merchant abroad has no effects in the hands of his correſpondent, yet if the courſe of dealing between them is ſuch, that the one has been uſed to ſend orders for inſurance, and the other to comply with them, the former has a right to expect that his orders for inſurance will ſtill be obeyed, unleſs the latter give him notice to diſcontinue that courſe of dealing. Thirdly, If the merchant abroad ſend bills of lading to his correſpondent here, he may engraft on them an order to inſure, as the implied condition, on which the bills of lading ſhall be accepted, which the other muſt obey, if he accept them, for it is one entire tranſaction. For if the commiſſion from abroad conſiſt of two parts, the one to accept the bill of lading, the other to cauſe an inſurance to be made, the correſpondent cannot accept it in part, and reject it as to the reſt.

Wallace v. Telfair. Sittings after Trinity 1786. before Mr. Juſtice Buller. 2 Term R. 188. note (*a*).

So alſo if a merchant here accept an order for inſurance and limit the broker to too ſmall a premium, in conſequence of which no inſurance can be procured, he is liable to make good the loſs to his correſpondent.

But if a perſon, to whom ſuch orders are ſent, does what is uſual to get the inſurance made, that is ſufficient; becauſe he

(*a*) Smith v. Cologan 2 Term R. 188 note (*a*.) Niſi Prius before Mr. Juſtice Buller Mich. 1787.

is

Upon a motion for a new trial, the facts appeared to be theſe: The plaintiff, who lived at *St. Kitt's*, wrote a letter to the defendant, dated the 30th of *April* 1781, informing him that he intended to purchaſe a ſhip, and offering the defendant a ſhare. On the 4th of *May* 1781, he wrote a ſecond letter to the defendant, acquainting him, that he had purchaſed the ſhip, but had only a ſhare in it himſelf, the reſidue being divided into three or four more ſhares, one of which he had reſerved for the defendant, in caſe he ſhould wiſh to be concerned; and directing an inſurance upon the ſhip *at and from St. Kitt's to London*, warranted to ſail with convoy. On the 28th of *June*, the defendant * wrote to the plaintiff, that he had no objection to a fourth, or a ſhare equal to the plaintiff's. On the third of *July*, the plaintiff informed the defendant, that the ſhip had left the port to take in her cargo; that ſhe let go an anchor at *Sandy Point*, but as the wind blew freſh, *ſhe drove out, and could not come in again*; *that ſhe was obliged to go to Euſtatius*, and he therefore hoped that the defendant had not neglected to make the inſurance, for fear of accidents. The defendant, on the 19th of *July*, wrote thus to the plaintiff: "The inſurance you ordered ſhall "be done." Plaintiff again, on the 25th of *July*, wrote *that the Friendſhip did all in her power to get up from St. Euſtatius, but could not*, and therefore he ſold her to Mr. *Roſs* at *Euſtatius*. I have already tranſcribed as much of the ſeveral letters as are material to the ſubject of this chapter; in addition to which, the following facts appeared in evidence: That the ſhip *Friendſhip* had ſailed from *St. Euſtatius*, on the 1ſt of *Auguſt*, with the convoy, and that ſhe had afterwards foundered at ſea; that *St. Euſtatius* is in the direct road to *London* from *St. Kitt's*, and the convoy from *St. Kitt's* always looked into *St. Euſtatius*, to take up any ſhips that might be there; that if the *Friendſhip* had ſailed from *St. Kitt's*, ſhe muſt have gone by *Euſtatius*; but would not have ſtopped there: that when ſhe was driven to *St. Euſtatius*, *after making ſeveral efforts to get back to St. Kitt's* to finiſh her loading, and finding ſhe could not ſucceed, ſhe then took in the reſt of her loading at *St. Euſtatius*.

* P. 305

At the trial, ſeveral grounds of defence were made; but the only one, material for our conſideration was, that the remaining at *St. Euſtatius*, and not going back to *St Kitt's*, was a deviation. The learned judge, who tried the cauſe, was of opinion that it was not a deviation, being occaſioned by ſtreſs of wea-

is no inſurer, and is not obliged to get inſurance at all events. Thus if he ſend to Lloyd's and the underwriters refuſe to take the riſk at any premium; and he afterwards ſend to get inſurance done at *Newcaſtle*, he has done his duty, and can never afterwards be charg'd in this action, more eſpecially if the plaintiff adopt and approve his acts.

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ther. Upon this ground, amongſt others, the motion for a new trial was founded.

After argument at the bar,

Lord *Mansfield* ſaid, the only material queſtion is, whether there is a a deviation in this caſe: and that depends on the evidence. If a ſtorm drive a ſhip out of her voyage into any port, and being there, ſhe does the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven; but here the witneſſes ſay, ſhe tried * P. 306 * to get back to *St. Kitt's* and could not: and it is a much eaſier navigation to go directly from *St. Euſtatius* to *London*, than to go back to *St. Kitt's* firſt. And as to the taking in the cargo at *St. Euſtatius*, I do not find that the ſhip loſt any time by it. Every thing is the effect of the ſtorm, and occaſioned by it. This is the only point, on which I had any doubt, and it required ſome conſideration. It was a queſtion, which was proper to be left to a jury, whether this was the ſame voyage or not, and they have determined it.

Mr. Juſtice *Willes* inclined to a different opinion. My only doubt is, whether it was the ſame voyage as that inſured. So far as the ſhip was driven by ſtreſs of weather, ſo far there is an exception. When ſhe is driven to *St. Euſtatius*, ſhe attempts to get back to *St. Kitt's*; but I do not find that ſhe made any attempt to get to *London* at that time. When ſhe was at *St. Euſtatius*, the owner of the ſhip ſold her to *Roſs*, who loaded her afreſh with tobacco inſtead of ſugar, which was to have been her original cargo; ſo that there is a new cargo, a new owner, and a new voyage. In theſe caſes we lean very much to deviation. In a caſe lately determined in this court, it was held, that going to *Beaumaris*, though only a few leagues out of the way, was a deviation. It ſtrikes me as a caſe of ſome difficulty: perhaps the jury had not evidence enough laid before them, on which to determine; for there is nothing ſaid on the part of the defendant as to the uſual courſe of the voyage. The riſk was certainly encreaſed by the ſhip's continuing at *St. Euſtatius* ſo long; for the inſurance, if good at all, was good all the time ſhe lay by at *St. Euſtatius*; and ſhe might have continued there much longer. In my opinion, it is very well worth the re-conſideration of a jury.

Mr. Juſtice *Aſhhurſt*.—This ought to be conſidered as the ſame voyage inſured. Wherever a ſhip is driven by ſtreſs of weather out of her own port into another, that ſhall not be conſidered as a deviation. Here the ſhip was forced by ſtreſs of weather to go to *St. Euſtatius*; and being there, ſhe endeavoured ſeveral times to get back to *St. Kitt's*, but without effect. In fact it was beter for the parties that the cargo ſhould be completed at *St. Euſtatius*; her continuing there, rather diminiſhes the riſk than otherwiſe; becauſe if ſhe had

had gone back to *St. Kitt's*, it would have taken up a longer * time. If then every thing was done, that could be done, under ſuch circumſtances, for the benefit of the adventure, this ſhall not vacate the policy.

* P. 307

Mr. Juſtice *Buller*.—It has been much relied on in this caſe, that there was a change of property; but that, in my opinion, makes no difference. Then laying that out of the queſtion, and ſuppoſing the ſhip as not being ſold to *Roſs*, I will firſt conſider whether this is a different voyage. But that cannot be, as it would be contrary to the evidence: neither is it true, that the veſſel afterwards purſued the ſame voyage by accident; from that part of the cargo, which ſhe took in at *St. Kitt's*, continued on board of her the whole time, and the original intention of the ſhip's coming to *London*, was likewiſe continued; the parties never thought of a different voyage. But it is ſaid, that ſhe took in another cargo at *St. Euſtatius*: what ſays the evidence? Where a captain has not taken in a full cargo, it is uſual to take in the reſt at *St. Euſtatius*; ſuch was proved to be the cuſtom of the voyage: and it was proved, that on a *voluntary* act of the captain's going to *St. Euſtatius*, the policy would have protected the ſhip's ſtay there; *a fortiori* it will, when the ſhip was driven there by ſtreſs of weather. As to the defendant's not being prepared at the trial to anſwer the uſage, he ought to have come prepared with that, which was the giſt of his defence. Then was the riſk altered? had it been ſo, it was in the defendant's power to have proved it: but there was no proof that it was altered; part of the ſame cargo continues; nor does it appear that they meant to alter the cargo, for ſhe endeavoured to get back to *St. Kitt's* to take in the reſt; but was prevented by ſtorms, I think the riſk would in reality have been much greater if ſhe had gone back; for ſhe muſt have come by the way of *St. Euſtatius* again in her paſſage home. The part of her cargo, which was taken in at the time the ſhip was driven from *St. Kitt's*, has already been paid for by the defendant; even this would not have been paid for by the defendant, if he had conceived that the voyage had been at an end. The learned judges therefore, except Mr. Juſtice *Willes*, after giving their opinions upon the other points in the cauſe, ordered the rule for a new trial to be diſcharged.

* A deviation may alſo be juſtified, if done to avoid an enemy, or ſeek for convoy; becauſe it is in truth no deviation to go out of the courſe of a voyage, in order to avoid danger, or to obtain a protection againſt it.

* P. 308

In an action upon a policy, which was to inſure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy: the caſe was this, the *Galley* ſet ſail from *Bremen*, under the convoy of a *Dutch* man of war to

Bond v. Gonſales 2 Salk. 445.

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the *Elb*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war and an Admiral. After a ſtay of nine weeks, they ſet out from the *Texel*, and the *Galley* was ſeparated in a ſtorm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80*l.* ſalvage.

It was ruled by Lord Chief Juſtice *Holt*, that the voyage ought to be according to uſage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ſhips directly from *Bremen* to *London*. And the plaintiff had a verdict.

Gordon v. Morley. Campbell v. Bordieu. 2 Stra. 1265

On an inſurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*; and the ſhip *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. The inſurers inſiſted that this being the time of a *French* war, the ſhip ſhould not have ventured through the channel, but have waited in the *Downs* for an occaſional convoy. And many merchants and office-keepers were examined to that purpoſe.

But Lord Chief Juſtice *Lee* held that the ſhip was to be conſidered as under the defendant's inſurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the inſurance from what is commonly underſtood, they ſhould have particularized her departure with convoy from the *Downs*. The juries were compoſed of merchants; and in both caſes they found for the plaintiffs upon the ſtrength of this direction.

* P. 309

* In the caſe of *Bond* againſt *Nutt*, in which the material queſtion was, whether a warranty had or had not been complied with, and which conſequently will be fully ſtated in the following chapter, the point of deviation for the purpoſe of procuring convoy alſo came under the conſideration of the court. Upon that occaſion Lord *Mansfield* and the whole court held, that if a ſhip go to the uſual place of rendezvous, for the ſake of joining convoy there ready, though ſuch place be out of the direct courſe of the voyage, it is no deviation.

Cowp. Rep. 601.

Enderby and Another v. Fletcher. Sittings in London. Trin. Vac. 1780.

And in a more modern caſe, the only queſtion was, whether there was a deviation or not. Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the beſt of his judgment: that he had no other view or motive but to come the ſafeſt way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

In our law books we ſometimes meet with caſes, which ſay, that a deviation may be juſtified by the uſage and cuſtom of the trade

trade, But that is not quite correct; for if by the uſage of any particular trade, it is cuſtomary to ſtop at certain places, lying out of the direct courſe from *A.* to *B.* it is not a deviation to ſtop there; becauſe it is a part of the voyage. There is no deception upon the inſurer; becauſe he is bound to take notice of the uſages of trade; they are notorious to all the world; and when the uſage has declared it lawful in a ſpecific voyage to go to any place, though out of the immediate track, it is as much a part of the contract of inſurance between the parties, as if it had been particularly mentioned. But in order to juſtify the captain of a ſhip in quitting the ſtraight and direct line from the port of loading to that of delivery, there muſt be a preciſe, clear and eſtabliſhed uſage upon the ſubject, not depending merely upon one or two looſe, and vague inſtances.

Where a ſhip was inſured from *Liverpool* to *Jamaica*, and had put into the *Iſle of Man*; it appeared that there were *ſome inſtances* of the *Liverpool* ſhips putting in there, but it was not the ſettled, common, eſtabliſhed, and direct uſage of the voyage and trade: it was therefore held a deviation, and the underwriters were diſcharged from any loſs that happened ſubſequent to the deviation. Saliſbury v Townſon.

* Having thus mentioned all the caſes to be found in the books of reports, which operate as an excuſe for a departure from the due courſe of the voyage, and which prevent thoſe effects, which always follow a deviation, namely, the diſcharge of the inſurer from his contract; it will be proper to obſerve, that it is not meant to inſinuate that other circumſtances may not frequently happen, which will have preciſely the ſame conſequences. For wherever a ſhip does that which is for the general benefit of all parties concerned, the act is as much within the intention and ſpirit of the policy, and conſequently as much protected by it, as if expreſſed in terms. And therefore in all caſes, in order to determine whether a diverſion from the direct courſe of the voyage is ſuch a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and conſequences of the act, as the true criterion of judgment. * P. 310 Cowp. 601

If any of the circumſtances above ſtated do really and *bonâ fide* occur, ſo as to render a deviation abſolutely neceſſary, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and in the ſhorteſt time poſſible, otherwiſe the underwriters will be diſcharged. Becauſe a voyage ſuperadded by neceſſity, ought to be ſubject to the ſame qualifications, and entitled only to the ſame ſort of latitude as the original voyage, it having become by operation of law, a part, as it were, of that original voyage.

This was laid down as law by the Court of King's Bench in a caſe, in which the voyage inſured was deſcribed in theſe words: "At and from *Port L'Orient* to *Pondicherry*, *Madras*, and "*China*, and at and from thence back to the ſhip's port, or Lavabre v. Walter. Dougl. 271.

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" ports of diſcharge in *France* with liberty to touch, in the " outward or homeward-bound voyage, at the Iſles of *France* " and *Bourbon*, and at all or any other ports, or places, what or " whereſoever: and it ſhall be lawful for the ſaid ſhip, *in this* " *voyage* to proceed and ſail to, and touch and ſtay at any ports " or places whatſoever, as well on this ſide, as on the other " ſide, the *Cape of Good Hope*, without being deemed a devia- " tion." The ſhip did not ſail till the 6th of *December* 1776, " and did not reach *Pondiſchery* till the 23d of *July* 1777. She continued there till the 23d of *Auguſt* following, when inſtead of proceeding to *China*, ſhe ſailed for *Bengal*, where having paſſed the winter, and undergone very conſiderable repairs, ſhe ſailed

* P. 311 * from thence, early in the year 1778, (being the ſecond ſhip that left the *Ganges*) returned to *Pondicherry*; and, after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year by the *Mentor* privateer. The uſual time, in which the direct voyage between *Pondicherry* and *Bengal* is performed, is ſix or ſeven days, but the *Carnatic* was about ſix weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, ſhe either touched at, or lay off, *Madras*, *Maſulipatam*, *Viſigapatam* and *Yanon*, and took in goods at all thoſe places. The plaintiffs reſted their caſe chiefly on this ground, that the voyage to *Bengal* was adopted by neceſſity for the ſafety of the ſhip, upon the *bona fide* opinion of the captain and the reſt of the officers, and of one *Berard* the ſupercargo who had the principal management. To prove this neceſſity it was ſworn by *Berard* and four mates, that the ſhip had been detained longer in *Europe* than at at firſt was foreſeen and that ſhe met with extremely bad weather on her outward paſſage; and at *Pondicherry* was ſo leaky, that it appeared to them, that ſhe muſt be careened, which could only be done at *Bengal*, there being no other place ſo near, to which ſhe could proceed with ſafety, where that operation could be performed; for that no harbour between *Pondicherry* and the *Ganges* on the one ſide, and *Pondicherry* and *Bombay* on the other, would admit of ſo large a veſſel being hove down, her burthen being near 800 tuns. Indeed it turned out when they got to *Bengal*, that ſhe could be repaired without careening; but this was only diſcovered, they ſaid, after ſhe was unloaded of much more of her contents than could have been done with ſafety in the open road of *Pondicherry*. All the witneſſes for the plaintiffs ſwore that they took the reſolution of going to *Bengal* much againſt their inclination; for that it would have been not only more for the advantage of the owners, but alſo more for their private intereſt as individuals, to go to *China*, they having prepared their own adventures for that market. Beſides the circumſtances of the leak, they aſſigned an additional

ditional reaſon for relinquiſhing the voyage to *China*, *viz.* that they had been ſo long detained at *Pondicherry*, from delays in unloading their outward-bound cargo, that they were not ready to leave that place, till it was too late to undertake the * *China* voyage with any degree of prudence or ſafety; and they ſaid *Bengal* was the beſt place they could go to, in order to winter. The defence ſet up was: 1ſt, That the ſhip had never ſailed on the voyage inſured, her deſtination, *when ſhe left Europe*, having been for *Bengal*, and not for *China*. 2d. That ſuppoſing her to have ſailed on the voyage deſcribed in the policy, yet her going from *Pondicherry* to *Bengal*, inſtead of proceeding to *China*, was a deviation, and was not juſtified by neceſſity. In ſupport of the firſt ground of defence, certain ſecret inſtructions were relied upon which were found on board the ſhip, and were addreſſed by the owners at *L'Orient* to *Berard* the ſupercargo, and which, though obſcurely penned, gave great room to contend, either that at her departure, it had been reſolved to ſubſtitute the *Bengal* for the *China* voyage, or, at leaſt that the alternative was left with *Berard*, to be decided one way or the other, according to certain events in *India*, which events turned out in the ſort of way that, according to the inſtructions, was to determine the voyage for *Bengal*. On the ſecond ground, it was ſaid, that from the plaintiff's own witneſſes, there was no neceſſity for going to *Bengal*; and that inſtead of going directly thither, a trading voyage had been made from *Pondicherry*, which afforded a ſtrong preſumption that trading, and not the leak, or lateneſs of the ſeaſon, was the object of going to *Bengal*. On the part of the defence alſo, ſeveral letters were read (written by the owners to their correſpondents who had got the policy underwritten) to raiſe a preſumption that the neceſſity of going to *Bengal*, was merely a pretence deviſed after the capture; and when the inſured began to apprehend that the words of the policy would not cover a voyage to that place. This is the ſubſtance of the evidence given in this, and two other cauſes upon the ſame ſhip, though not on the ſame policy: in addition to which in the preſent caſe, the ſecret inſtructions given to *Berard* had been more attentively peruſed, and afforded ſtronger reaſons than they at firſt ſeemed to do, that the voyage to *Bengal* was predetermined before the departure from *L'Orient*. The plaintiff's witneſſes were much preſſed, on this occaſion, to ſay, whether the lateneſs of the ſeaſon alone was ſuch as, independant of the leak, would have determined them to abandon the *China* voyage; and the on other hand, whether the leak, * independent of the other reaſon, would, in their opinion, have rendered it neceſſary ſo to do. To this they ſaid, they could not give a certain anſwer; for that, as neither of the caſes had happened, they had not exerciſed their judgment upon them.

* P. 312

Vide ante, c. 2.

* P. 313

Lord

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Lord *Mansfield* ſummed up very ſtrongly againſt the plaintiffs, on the head of fraud. But independent of that ground, he ſtated a new point againſt them, namely, that if neceſſity were admitted to have been the ſole motive for ſubſtituting the voyage to *Bengal* in the place of that of *China*, *ſtill it was incumbent on the inſured to have purſued that voyage of neceſſity directly, in the ſhorteſt and moſt expeditious manner*; *and that the delay in going from Pondicherry to Bengal, and the repeated ſtops by touching at different places, and trading there, were deviations, and not within the protection which the ſuppoſed neceſſity afforded to the direct voyage.*

Notwithſtanding this direction, the jury found a verdict for the plaintiff. Upon a motion for a new trial, after argument at the bar, the opinion of the court of King's Bench was delivered by

Lord *Mansfield*.—If this application were made upon the ground of impeaching the teſtimony of the plaintiff's witneſſes, whatever my private ſentiments might be, after two concurrent verdicts, I ſhould not be inclined to interpoſe. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the caſe has been ill decided. The queſtion is, whether, without imputation on any body, circumſtances have not happened to take the voyage out of the policy. A deviation from neceſſity muſt be juſtified, both as to ſubſtance and manner. *Nothing more muſt be done than what the neceſſity requires.* The true objection to a deviation is not the increaſe of the riſk. If that were ſo, it would only be neceſſary to give an additional premium. It is, that the party contracting has voluntarily ſubſtituted another voyage for that which has been inſured. If the voyage to *Bengal* was unavoidable, where was the neceſſity to trade? All the ports touched at were out of the direct courſe; and ſix weeks and two months were conſumed, inſtead of ſix days. The juſtice of the caſe required a different deciſion. The rule for a new trial was accordingly made abſolute. The cauſe was again ſet down for trial; but the plaintiffs, when they were ready to be called on, ſubmitted to the opinion of the court, and abandoned their claim againſt the underwriters.

* P. 314

But though an actual deviation from the voyage inſured is thus fatal to the contract of inſurance; yet a deviation merely intended, but never carried into effect, is conſidered as no deviation, and the inſurer continues liable. This has been frequently ſo decided. Thus in the caſe of inſurance from *Carolina* to *Liſbon*, and at and from thence to *Briſtol*; it appeared, that the captain had taken in ſalt, which he was to deliver at *Falmouth*, before he went to *Briſtol*; but the ſhip was taken in the direct road to both, and before ſhe came to the point where ſhe would have turned off to *Falmouth* It was held, that the inſurer was liable; for it is but *an intention to deviate*

Foſter v. Wilmer. 2Stra. 1249.

1.d.Ch Juſt. Lee.

deviate, and that was held not ſufficient to diſcharge the underwriter.

In the caſe of *Carter* v. the *Royal Exchange* Aſſurance Company, where the inſurance was from *Honduras* to *London*, and a conſignment to *Amſterdam*: a loſs happened before ſhe came to the dividing point between the two voyages, for which the inſurers were held liable to pay. 2 Stra. 1249.

The doctrine laid down in theſe caſes has ſince been frequently recognized in ſubſequent deciſions, and particularly by Lord *Mansfield* in the caſe of *Thelluſſon* v. *Ferguſſon*, which will be fully reported in the next chapter. The inſurance was from *Guadaloupe* to *Havre*, and by the depoſitions it appeared that the ſhip ſailed for *Havre*, and was always intended for *Havre*; but was directed to keep in the courſe of *Breſt* for ſafety. One of the grounds of defence was, that the ſhip never ſailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Breſt*. Lord *Mansfield*, in anſwer ſaid, "the voyage to *Breſt* was, "at moſt, but an *intended deviation*, not carried into effect." Dougl. 346.

If, however, it can be made appear by evidence, that it never was intended nor came within the contemplation of the parties, to ſail upon the voyage inſured; if all the ſhip's papers and documents be made out for a different place from that deſcribed in the policy, the inſurer is diſcharged from all degree of reſponſibility, even though the loſs ſhould happen before the dividing point of the two voyages. This diſtinction was very properly taken by the court of King's Bench, in a very modern caſe: and by that diſtinction they admitted the general doctrine, with reſpect to the intention to deviate, in its fulleſt extent. * P. 315

The ſhip *Molly* being inſured "at and from *Maryland* to *Cadiz*," was taken in *Cheſapeak Bay*, in the way to *Europe*. Upon this the inſured brought this action againſt the defendant, one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the caſe appeared to be as follows:—The ſhip was cleared from *Maryland* to *Falmouth*, and a bond given that all the *enumerated* goods ſhould be landed in *Britain*, and all the other goods in the *Britiſh* dominions. An affidavit of the owner ſtated that the veſſel was bound for *Falmouth*. The bills of lading were, "To *Falmouth* and a market:" and there was no evidence whatever that ſhe was deſtined for *Cadiz*. The place where ſhe was taken, was in the courſe from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumſtances led to a ſuſpicion that ſhe was, in truth, neither deſigned for *Falmouth* nor *Cadiz*, but for the port of *Boſton*, to ſupply the *American* army; but there was not ſufficient direct evidence of that fact.—At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they muſt find for the Wooldridge v. Boydell. Dougl. 16.

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the plaintiff. If, on the contrary, they ſhould think there was no deſign of going to *Cadiz*, they muſt find for the defendant. It alſo appeared in evidence, that the premium to inſure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this caſe. Upon the motion for a new trial being argued, the counſel for the plaintiff cited the two caſes above ſtated from *Strange's* Reports.

Lord *Mansfield*.—The policy, on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage to *Cadiz*. All contracts of inſurance muſt be founded on truth, and the policies framed accordingly. When the inſured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man ſo fooliſh as to intend a deviation from the voyage deſcribed, when the inſurance is made, becauſe that would be paying without an indemnification. Deviations from the voyage inſured ariſe from after-thoughts, after-intereſt, after-temptation; and the party, who actually deviates from the voyage deſcribed, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the caſes of that ſort, the *terminus a quo*, and *ad quem*, were certain and the ſame. Here, was the voyage ever intended for *Cadiz?* There is not ſufficient evidence of the deſign to go to *Boſton*, for the court to go upon. But ſome of the papers ſay to *Falmouth* and a market: ſome to *Falmouth* only. None mention *Cadiz*, nor was there any perſon in the ſhip, who ever heard of any intention to go to that port. A *market* is not ſynonimous to *Cadiz*; that expreſſion might have meant *Naples*, *Leghorn*, or *England*. No man, upon the inſtructions, would have thought of getting the policy filled up to *Cadiz* In ſhort, that was never the voyage intended, and conſequently is not what the underwriters meant to inſure.

* P. 316

Mr. Juſtice *Buller*.—I am of the ſame opinion, I believe the law to be according to the authorities mentioned on the part of the plaintiff; but it does not apply here. This is a queſtion of fact. There cannot be a deviation from that, which never exiſted. The weight of the evidence is, that the voyage was never deſigned for *Cadiz*.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurring in the opinion delivered by Lord *Mansfield* and Mr. Juſtice *Buller*, the rule for a new trial was diſcharged.

Way v. Modigliani 2 Term. Rep. 30.

In a ſtill later caſe the ſame doctrine was advanced, namely, that if a ſhip be inſured from a day certain from *A.* to *B.* and before the day ſail on a different voyage from that inſured, the aſſured cannot recover; even though the ſhip afterwards fall into the courſe of the voyage inſured, and be loſt after the day on which the policy was to have attached.

From

From the propoſition juſt eſtabliſhed, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate conſequence, that whatever damage is ſuſtained before actual deviation, will fall upon the underwriters.

• Thus it was held by Lord Chief Juſtice *Holt*, who ſaid, that if a policy of inſurance be made to begin from the departure of the ſhip from *England* until, *&c.* and after the departure a damage happens, *&c.* and then the ſhip *deviates*; though the policy is diſcharged from the time of the deviation, yet for the damages ſuſtained before the deviation, the inſurers ſhall make ſatisfaction to the inſured. • P. 317 Green v. Young. 2 Ld. Raym. 840, 2 Salk. 444. S. C.

Subject to the rules already advanced, deviation or not is a queſtion of fact, to be decided according to the circumſtances of the caſe. Doug. 758.

In caſes of deviation, the premium is not to be returned; becauſe the riſk being commenced, the underwriter is entitled to retain it: but of this more will be ſaid in a ſubſequent chapter. Vide Poſt. c. 19.

*CHAPTER THE EIGHTEENTH. • P. 318

Of Non-Compliance with Warranties.

IN the two preceding chapters we have ſeen the effect, which the non obſervance of implied conditions has upon the contract of inſurance; we ſhall now proceed to conſider the nature of warranties; their various kinds; and how far they muſt be complied with on the part of the inſured, in order to render the contract binding between the parties. A warranty in a policy of inſurance is a condition or a contingency, that a certain thing ſhall be done, or happen, and unleſs that is performed, there is no valid contract. It is perfectly immaterial for what view the warranty is introduced; or whether the party had any view at all: but being once inſerted, it becomes a binding condition on the inſured: and unleſs he can ſhew that he has literally fulfilled it, or that it was performed, the contract is the ſame, as if it had never exiſted. We have already ſeen that the breach of an implied condition is ſufficient to avoid the policy; *a fortiori*, therefore, the effect muſt be the ſame, where the condition is expreſs, and not liable to miſrepreſentation or error, becauſe it makes a part of the written contract. To ſay that the underwriter ſhould anſwer for a loſs, notwithſtanding the other party has failed in his engagements, would be to make a different rule in this ſpecies of contract, from that which ſubſiſts in every other; although this of all other contracts depends moſt upon the ſtricteſt attention to the 1 Term Rep. p. 345. Chap. 16, 17.

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pureſt rules of equity and good faith. Indeed the obligation to a ſtrict performance of all promiſes and conditions in every ſpecies of contract, may be deduced, as has been truly obſerved by an elegant moral writer, from the neceſſity of ſuch a conduct to the well-being, or the exiſtence of human ſociety.

Paley's Mor. Phil.

We have ſaid that a warranty muſt be ſtrictly and *literally* performed; and therefore, whether the thing, warranted to be * done, be or be not eſſential to the ſecurity of the ſhip; or whether the loſs do or do not happen, on account of the breach of the warranty, ſtill the inſured has no remedy: becauſe he himſelf has not performed his part of the contract, and if he did not mean to perform, he ought not to have bound himſelf by ſuch a condition. And though the condition broken be not perhaps, a material one, yet the juſtice of the law is evident from this conſideration: that it is abſolutely neceſſary to have one rule of deciſion; and that it is much better to ſay, that warranties ſhall in all caſes be ſtrictly complied with, than to leave it in the breaſt of a judge or jury to ſay, that, in one caſe it ſhall, and in another it ſhall not. The very meaning of a warranty is to preclude all enquiries into the materiality, or the *ſubſtantial* performance of it: and although ſometimes partial inconveniences may ariſe from ſuch a rule; yet upon the whole, it will certainly produce publick ſalutary effects. The inſured is bound not to draw the underwriter into error, by falſe declarations reſpecting thoſe things, about which the contract is made, *Debet præſtare rem ita eſſe ut affirmavit.*

* P. 319

1 Term. Rep. p. 346.

Pothier Tr. du Contrat d'Aſſurance, p. 197.

But as a warranty muſt be ſtrictly complied with in favour of the underwriter, and againſt the inſured, equal juſtice demands, and the true meaning of the contract of inſurance requires, that if a ſtrict and literal compliance with the warranty will ſupport the demand of the inſured, the deciſion ought to be in his favour, eſpecially when by ſuch a deciſion all the words in the policy will have their full operation.

Blackhurſt v. Cockell. 3 Term. R. 360.

In an action on a policy on goods, dated 9th *December*, 1784, *loſt or not loſt, warranted well this 9th day of December*, 1784: it appeared, that the warranty was at the foot of the policy; that the policy was underwritten between the hours of one and three in the afternoon of the 9th of *December*; that the ſhip was well at 6 o'clock in the morning, but was loſt at 8 o'clock the ſame morning.

Upon a motion to ſet aſide a nonſuit, which had been entered, Lord *Kenyon* Chief Juſtice, *Aſhhurſt Buller*, and *Groſe*, Juſtices, were clearly of opinion, that the warranty was ſufficiently complied with, if the ſhip were well at any time that day: that the nature of a warranty goes to determine the queſtion; for as it is a matter of indifference whether the thing warranted be, or be not material, and yet muſt be literally complied with; ſtill if it be complied with, that is enough:

* P. 320

that

that there was good reaſon for inſerting theſe words, becauſe they protected the underwriter from loſſes before that day, to which he would otherwiſe have been liable, as the policy was on the goods from the lading: and thus too, the words *loſt, or not loſt* have alſo their operation.

Cowp. 607.

This being the caſe, it follows as a neceſſary conſequence, that it is very immaterial to what cauſe the non compliance is to be attributed; for if the fact be, that the warranty was not complied with, though perhaps for the beſt reaſons, the policy has no effect. The contingency has not happened; and therefore the party intereſted has a right to ſay, that there is no contract between them. Upon this account it is, that if a ſhip be warranted to ſail on or before the 1ſt of *Auguſt*, and ſhe be prevented by any accident from ſailing till the 2d of *Auguſt*, as by the ſudden want of any neceſſary repair, or by the appearance of an enemy at the mouth of the port, the captain would do right not to ſail; but there would be an end of the policy.

In this ſtrict and literal compliance with the terms of a warranty conſiſts the difference between a warranty and a repreſentation

Of this diſtinction ſomething was ſaid in a preceding chapter: it is ſufficient now to obſerve, that a warranty, as part of the agreement, and a condition on which it was made, muſt be *ſtrictly* complied with; whereas a repreſentation need only be performed *in ſubſtance*. In a warranty, the perſon making it takes the riſk of its truth or falſehood upon himſelf: in a repreſentation, if the inſured aſſert that to be true, which he either knows to be falſe, or about which he knows nothing, the policy is void on account of fraud. But a repreſentation, made without fraud, if not falſe in a *material* point, or if it be *ſubſtantially*, though not *literally* fulfilled, does not vitiate the policy.

Vide ante c. 10.

Pawſon v. Watſon. Cowp. 787.

* But as repreſentations were very often made in writing, by way of inſtructions for effecting a policy, it became neceſſary to ſpecify what written declarations ſhould be deemed warranties, and what repreſentations. It was, therefore, by ſeveral deciſions of the courts, held to be law, that in order to make written inſtructions valid and binding as a warranty, they muſt appear on the face of the inſtrument itſelf, by which the contract of inſurance is effected.

* P. 321

This was declared by Lord *Mansfield* in a very particular manner in anſwer to a queſtion put to him by Mr. *Davenport* at the deſire of the underwriters, after he had delivered the opinion of the court upon a queſtion on a repreſentation.

Pawſon v. Watſon. Cowper 790.

Even though a written paper be *wrapt up in the policy*, when it is brought to the underwriters to ſubſcribe, and ſhewn to them at that time: or even though it be *waſered to the policy*,

at

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at the time of ſubſcribing; ſtill it is not in either caſe a warranty, or to be conſidered as part of the policy itſelf, but only as a repreſentation. Both theſe inſtances have occurred in cauſes before Lord *Mansfield*.

Pawſon v. Barnevelt, at Guildh. Trin. Vac. 1779. Doug. p. 12. in the notes.

In an action on a policy of inſurance, the counſel for the defendant offered to produce witneſſes to prove, that a written memorandum incloſed was always conſidered as part of the policy. But Lord *Mansfield* ſaid, it was a mere queſtion of law, and would not hear the evidence; but decided, that a written paper did not become a ſtrict warranty, by being folded up in the policy.

Bize v. Fletcher, at Guildh. Eaſt. Vac. 1779. Doug. p. 12. in the notes.

In the other caſe it appeared, that at the time when the inſurers underwrote the policy, a ſlip of paper was wafered to it, deſcribing the ſtate of the ſhip as to repairs and ſtrength, and alſo mentioning ſeveral particulars of her intended voyage, which particulars in the event, had not been complied with, Lord *Mansfield* ruled, that this was only a repreſentation; and if the jury ſhould think there was no fraud intended, and that the variance between the intended voyage, as deſcribed in the ſlip of paper, and the actual voyage as performed, did not tend to increaſe the riſk of the underwriters, he directed them to find for the plaintiff, which they accordingly did.

* P. 322

* This verdict was afterwards ſet aſide upon another ground.

Doug. 271.

It being thus ſettled, that a warranty muſt appear on the face of the inſtrument, it ſtill became a queſtion, whether a warranty, written in the margin of the policy, was to be conſidered equally binding, and ſubject to the ſame ſtrict rule of conſtruction, as if inſerted in the body of the policy itſelf, This point came under the conſideration of the court in the caſe of *Bean* and *Stupart*, in which the material queſtion was, whether, ſuppoſing it to be a warranty, *boys* were included under the word *ſeamen*. That caſe, as far as it is material to our preſent enquiry, was as follows:

Bean v. Stupart. Dougl. 10.

The plaintiff inſured the ſhip called the *Martha*, at and from *London* to *New York*; the voyage to commence from a day ſpecified; and in the *margin* of the policy were written theſe words, "Eight nine pounders with cloſe quarters, ſix "ſix pounders on her upper decks; thirty ſeamen beſides "paſſengers."

Upon a motion for a new trial in this caſe, Lord *Mansfield* ſaid, there is no doubt but this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable if it were not complied with; becauſe it is a condition on which the contract is founded.

Kenyon v. Berthon. Mich. Vac. 1779. Doug. p. 12. ote (4.)

In an action on a policy of inſurance, it appeared that the following words were written tranſverſly on the margin of the policy: "In port 20th *July*, 1776." In fact, the ſhip had ſailed

ſailed the 18th of *July*. The queſtion was, whether this marginal note was a warranty or a repreſentation.

Lord *Mansfield*, The queſtion is, whether the ſhip's being in port on the 20th is part of the condition of the inſtrument. When it is on the face of the inſtrument it is a part of the policy; ſo that here, if the ſhip was not in port, it is no contract. As to its being only in the margin, that makes no difference; it is all part of the contract when it is *once* ſigned. And though the difference of two days may not make any material difference in the riſk, yet as the condition has not been complied with, the underwriter is not liable.

* The propriety of theſe deciſions has never been queſtioned, and the rule has been conſtantly and tacitly acquieſced in from the time in which theſe caſes were determined till the year 1786, when, notwithſtanding the uniformity of the determinations upon the ſubject, it once more became an object of diſcuſſion. * P. 323

It came before the court upon a ſpecial verdict: it was an action of aſſumpſit brought by the plaintiff (an underwriter) againſt the defendant, to recover back the amount of a loſs which he had paid upon a policy of inſurance. The defendant pleaded the general iſſue. The cauſe came on to be tried before Mr. Juſtice *Buller* at *Guildhall*, when the jury found a ſpecial verdict, ſtating; De Hahn v. Hartley 2 Term Rep. p. 343.

That the defendant on the 14th of *June* 1779, gave to his inſurance broker inſtructions in writing, to cauſe an inſurance to be made on a certain veſſel, called the *Juno*. (Then the inſtructions are ſet out in the verdict, ſigned by the defendant.) The verdict then ſtates that the broker, in conſequence of ſuch inſtructions, on the ſaid 14th of *June* 1779, did cauſe a policy of inſurance to be made on the *Juno*, upon goods and merchandizes laden on board, and alſo on the ſhip, at and from *Africa*, to her port or ports of diſcharge in the *Britiſh Weſt Indies*, at and after the rate of 15*l. per cent.* The verdict, after reciting two memorandums, not material, then proceeded to ſtate, that *in the margin of the ſaid policy were written the words and figures following*: "Sailed from *Liverpool* with 14 ſix-pounders, ſwivels, "ſmall arms, and 50 *hands or upwards*; copper-ſheathed." That the plaintiff underwrote the policy for 200*l.* at a premium of 31*l.* 10s. That the *Juno* ſailed from *Liverpool* on the 13th of *October* 1778, having then only 46 *hands on board her*, and arrived at *Beaumaris*, in the Iſle of *Angleſea*, in ſix hours after her ſailing from *Liverpool*, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris*, on her ſaid voyage; and that at *Beaumaris* the *Juno* took in ſix hands more, and then had, and during the ſaid voyage, until the capture thereof, continued to have 52 hands on board her. That the ſaid ſhip in the voyage from *Liverpool* to *Beaumaris*, until and when ſhe

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took in the ſaid ſix additional hands, was equally ſafe, as if ſhe had had 50 hands on board her for that part of the voyage. The verdict then ſtates, that the defendant was intereſted, and that the

* P. 324 * ſhip was captured: that on receiving an account of the loſs of the veſſel, the plaintiff paid to the defendant the ſum of 200*l.* not having then had any notice that the ſaid ſhip had only 46 hands on board her when ſhe ſailed from *Liverpool.*

For the defendant it was ſaid, that this repreſentation had no relation to the voyage inſured; for that was *at and from Africa*, &c. whereas this is merely an account of the ſtate of the ſhip at *Liverpool.*

Lord *Mansfield.* There is a material diſtinction between a warranty and a repreſentation. A repreſentation may be *equitably* and *ſubſtantially* anſwered: but a warranty muſt be *ſtrictly* complied with. Suppoſing a warranty to ſail on the 1ſt of *Auguſt*, and the ſhip did not ſail till the 2d, the warranty would not be complied with. A warranty in a policy of inſurance, is a condition or a contingency, and unleſs that is performed there is no contract. It is perfectly immaterial, for what purpoſe a warranty is introduced; but being inſerted, the contract does not exiſt unleſs it is literally complied with. Now in the preſent caſe, the condition was, the ſailing of the ſhip with a certain number of men, which not being complied with, the policy is of no effect.

Mr. Juſtice *Aſhhurſt.* The very meaning of a warranty is to preclude all queſtions whether it has *been ſubſtantially* complied with: it muſt be *literally* ſo.

Mr. Juſtice *Buller.* It is impoſſible to divide the words, written in the margin, in the manner which has been attempted at the bar; that that part which relates to the copper ſheathing ſhould be a warranty, and not the remaining part. But the whole forms one entire contract, and muſt be complied with throughout. Judgment for the plaintiff. A writ of error was brought in the Exchequer Chamber upon this judgment, which, after two arguments, was affirmed by the unanimous opinion of the eight judges, compoſing that Court. Michaelmas Term 1787. 28th Geo. 3d.

Having ſtated thoſe rules, which apply to warranties in general, it will now be proper to conſider the ſeveral kinds of warranties, and thoſe principles which are peculiar to each ſpecies,

* P. 325 * confirmed by deciſions of the courts. It would be endleſs to enumerate the various warranties that are to be found in policies; becauſe they muſt frequently, and for the moſt part, do depend upon the particular circumſtances of each caſe; ſuch as the number of men, of guns, being copper ſheathed, &c. But thoſe which moſt frequently occur in our books of reports, and upon which the greateſt queſtions have ariſen, may be reduced

to

to three classes: Warranty as to the time of sailing; warranty as to convoy; and warranty of neutrality. Of each of these we shall treat; observing in the first place, that those rules which are applicable to warranty in general, must necessarily also apply to each of these individually.

1st. as to the time of sailing. In most voyages, the time at which they are to commence is a material circumstance; because in every country there are some seasons when navigation is much more dangerous than at others, owing to periodical winds, monsoons, and various other causes. Indeed, we have seen, that a man having once warranted to sail on a particular day, whether the risk be, in fact, materially altered or not by a breach of that warranty, the underwriter is no longer answerable. But this strict adherence to the very day specified, must have arisen from the principles just stated: for if a latitude of one day were given, why not extend it farther? It has therefore been held, that when a ship has been warranted to sail on a particular day, though the ship be delayed for the best and wisest reasons, or even though she be detained by force; the warranty has not been complied with, and the insurer is discharged from his contract.

Roccus. Not. 38.

Kenyon v. Berthon. Supra.

Thus, in an action on a policy of insurance, upon a motion to set aside the verdict which had been given for the plaintiff, the case appeared to be this. The declaration stated, that a policy was made on the ship *New Westmorland* at and from *Jamaica* to *London*, *warranted to sail on or before the 26th of July* 1776, free from capture, and free from all restraints and detainments of kings, princes, and people of what nation, condition, or quality soever. It further stated, that the said ship was preparing and ready to sail, and would have sailed on the 25th of *July*, on her intended voyage, *if she had not been restrained by the order and command of Sir Basil Keith*, the then * governor of *Jamaica*, and *detained beyond the day*: that she afterwards sailed and was captured. For the plaintiff it was said, that the usual clause against the detention of rulers and princes being inserted in this policy, the embargo, by which the ship was prevented from sailing on the day mentioned in the warranty, came expressly within the meaning of it, and therefore excused the delay,

Hore v. Whitmore. Cowp. 478.

* P. 326

On the other hand it was said, that the loss of the ship could in no possible respect be connected with the embargo. That the warranty was *positive and express*; that the ship should depart on or before the day appointed, and therefore must be complied with. Of this opinion was the court; and accordingly the rule to set aside the verdict for the plaintiff, and to enter a nonsuit was made absolute.

But the necessity of a punctual adherence to the day on which

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the ship is warranted to sail by the policy, is not peculiar to the law of *England*; for we find that foreign writers declare, that the same rule is universally adopted. If, say they, the owner of the ship or goods has said in the policy, that he will be ready to sail at a particular time, at which, perhaps, the navigation may be less dangerous; and on this account the insurer is more easily induced to underwrite the policy; and he afterwards delay the time of sailing, and the ship and goods perish, the underwriter is not bound, for he who neglects to depart at the appointed time, must, if he sail at a subsequent period, do it entirely at his own risk. (*a*)

Roccus Not. 38.

If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case; because the terms of the warranty are as much departed from in the one case as in the other.

Vezian v. Grant, bef. Mr. Just. Buller, Guildhall, East. Vac. 1779.

On the 8th of *December* 1777, a policy was underwritten by the defendant on goods in a *French* ship, *Le Comte de Trebon*, "at and from *Martinico* to *Havre de Grace*, with liberty to "touch at *Guadaloupe*; *warranted to sail after the 12th of* "* *January*, and on or before the 1st of *August* 1778." The insurance was made by the plaintiff on account of *Jacques Horteloupe* and *Louis Delamare*, of *Havre de Grace*, owners of the ship and cargo; at which time it was not known whether she would load at *Martinico* or *Guadaloupe*, they having goods to come from both places; the policy was therefore intended to cover the risk from both, or either of them. The ship, having finished her outward voyage at *Martinico*, *sailed from thence on the 6th of November* 1777, for *Guadaloupe*, where she took in her whole loading, without returning to *Martinico*, which the captain intended to do, had he not got a complete cargo at *Guadaloupe*; from whence she sailed on the 26th of *June* 1778, and was taken on the 3d of *September*. The plaintiff demanded payment of the loss from the underwriters, which being refused, he brought actions against them for the recovery thereof. This cause came on to be tried at *Guildhall*, before Mr. Justice *Buller*, when the defendant's objections were, that, according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*; and that the warranty of the time of sailing was not complied with, *the ship having sailed from Martinico before the 12th of January* 1778, to wit, on the 6th of *November* 1777. The jury, under the direction of the

* P. 327

(*a*) Roccus, in this passage, quotes the work of Santerna, upon insurances, who, he observes, *exclamat contra magistros navium, et nautas, quando detinentur in portu a mulierculis, vel dulcedine vini.*

learned

learned judge, were of that opinion, and accordingly found a verdict for the defendant.

But when a ship is warranted to sail on or before a particular day, if she sail from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another, part of the same island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. Cowp. 608. The ground is, that when a ship leaves her port of loading, when she has a full and complete cargo on board, and has no other object in view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port. If, indeed, her cargo was not complete, it would not have been a commencement of the voyage. It is true, in the case about to be reported, Lord *Mansfield* was of a different opinion, at the trial; and it certainly was a case of considerable difficulty: but when it came again before the court, it underwent a great deal of discussion, and after long and mature deliberation of all the judges, his lordship candidly acknowledged that his former decision was wrong; and upon a subsequent occasion, he declared he was completely convinced, that the voyage commenced from the port of loading. As that is the leading case upon this subject, it is here reported at length. * P. 328

This was an action on a policy of insurance upon the ship *Capel* in the *West India* trade, lost or not lost, *at and from* Jamaica *to* London; *warranted to have sailed on or before the 1st of* August 1776. The policy was effected on the 20th of *August* 1776, at a premium of 15 guineas *per cent.* to return 5 *per cent.* if the ship departed with convoy; and 8 *per cent.* if with convoy for the voyage, and arrived safe. At the trial, there was no controversy about the facts; and they are shortly these: the ship was completely laden for her voyage to *England*, at *St. Anne's* in *Jamaica*; *and sailed from* St. Anne's Bay, *on the 26th of* July *for* Bluefields, *in order to join the convoy there*, *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* station, like *Spithead* in *England*; and where a convoy then lay, which was expected to sail for *England* every day: but the greater part of the way from *St. Anne's* to *Bluefields*, is out of the direct course of the voyage from *St. Anne's* to *England*. That she arrived off *Bluefields* on the 28th or 29th of *July*, where she was immediately stopped by an embargo laid on all vessels being in any part of *Jamaica*, and was detained there till the 6th of *August*, when she sailed with the convoy for *England*; but afterwards, being separated in the passage, was taken by an *American* privateer. Upon these facts the jury found a verdict for the defendant. When this case was first argued at the bar, two points were relied upon for the defendant, in support of the verdict, which the jury had given in his favour: 1st. That Bond v. Nutt. Cowp. 601.

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the departure from *St. Anne's*, was not a departure from *Jamaica*, within the meaning of this policy. 2d. If it were, that the going to *Bluefields* was a deviation. Upon the firſt argument, Lord *Mansfield* ſaid: One point now ſtarted is entirely new: that ſuppoſing the voyage to have begun from *St. Anne's*, the going to *Bluefields* (which, it is admitted on all hands, was out of the courſe of the voyage) though for the purpoſe of convoy only, ſhall be conſidered as a deviation. In anſwer, it has been ſaid by the counſel for the plaintiff, that there are caſes in which the contrary has been held: but they are not cited. I could wiſh therefore that theſe caſes might be * particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude.

Vide the preceding chapter. * P. 329

The ſecond point was again argued; and then the judges ſeverally mentioned their ideas upon the ſubject, without coming at that time to any deciſion.

Lord *Mansfield*.—I am extremely glad this motion has been made; the cauſe came on at *Guildhall*, by the candour of the parties in the faireſt manner. But I had no intimation of its being a cauſe of conſequence till after the verdict; when I was informed 100,000*l.* depended upon it. The queſtion was fairly tried, and the caſe has been very well argued on both ſides. I have thought much of it ſince the trial. Some things are clear, and there are others which require conſideration. The policy was made on the 20th of *Auguſt* 1776, upon the contingency of a fact, which muſt have exiſted one way or the other at the time the policy was underwritten. That contingency was, that the ſhip ſhould have ſailed on or before the 1ſt of *Auguſt*: conſequently it muſt have taken place or not upon the 20th of that month. The port, from whence the ſhip was to be inſured, was, if I may uſe the expreſſion, the whole iſland of *Jamaica*: but from which of the ports the ſhip would ſail, neither party knew: therefore they have uſed the words, "at and from *Jamaica*:" by force of which, ſhe certainly was protected in going from port to port, and till ſhe ſailed. It follows, that the word *ſailed* in the warranty, muſt mean that ſhe had ſailed *on her homeward bound voyage*. The queſtion then is a matter of fact; and one that admits of no latitude, no equity of conſtruction, or excuſe. Had ſhe or had ſhe not ſailed on or before that day? That is the queſtion. No matter what cauſe prevented her; if the fact is, that ſhe had not ſailed, though ſhe ſtaid behind for the beſt reaſons, the policy was void: the contingency had not happened; and the party intereſted had a right to ſay, there was no contract between them. Therefore what was ſaid in argument is very true; if ſhe had been prevented

vented by any accident from ſailing till the ſecond of *Auguſt*, as by the ſudden want of any neceſſary repair, or if an enemy had been at the mouth of the port; the captain would have done very * right not to ſail, but there would have been an end of the policy. It is very different from the caſes where a voyage has been begun: there the uſage of the voyage may juſtify going a little out of the direct courſe. This alſo is clear; if the ſhip had broken ground, and been fairly under ſail upon her voyage for *England* on the 1ſt of *Auguſt*, though ſhe had gone ever ſo little a way, and had afterwards put back from the ſtreſs of weather, or apprehenſion from an enemy in ſight, or had then been put under an embargo, and had been detained till *September*, it would ſtill have been a *beginning* to ſail; and the ſtoppage would have come too late: becauſe the warranty was upon a fact antecedent Such a caſe happened before me a day or two after the preſent action was tried. It was an inſurance upon a ſhip from *Grenada* to *London*, *warranted to ſail on or before the 1ſt of Auguſt*. She had barely begun to ſail on the day, when ſhe was ſtopped by an embargo, and detained beyond the time. I thought the voyage was begun: the jury were of that opinion; and there has been no motion for a new trial. I am giving no opinion, only breaking the caſe. Here the whole queſtion turns upon this: did the voyage from *Jamaica* homeward begin from *St. Anne's*, or from *Bluefields?* Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reaſonable, and for the benefit of all parties: but ſtill it does not vary the fact of ſailing. Here it was very reaſonable: but the queſtion, whether the voyage began from *St. Anne's* or *Bluefields*, ſtill remains. Another material circumſtance ariſes from the words, "at and from *Jamaica*." At the trial, I reaſoned thus: "By the terms of the policy ſhe was protected "during her ſtay at *Jamaica:* by force of them, ſhe had a "right to go to any port, or all round the iſland; and ſhe went "to *Bluefields* for reaſons beſt known to herſelf. Therefore the "voyage began from *Bluefields*." Had the inſurance been at and from the port of *St. Anne's*, it did ſtrike me, that going round the iſland to *Bluefields*, would have been a deviation. But this is a queſtion of ſo much value and conſequence, that the court wiſhes to conſider the caſe thoroughly, before they give a final deciſion upon it.

* P. 330

Thelluſſon v. Ferguſſon at Guildhall. Hil. Vac. 1777.

Mr. Juſtice *Aſton*.—I ſhall be very glad to conſider this caſe. As at preſent adviſed, it ſeems to me to depend upon a mere matter of fact: and therefore to be very different from the caſes * of deviation that have been put. In them, the change of voyage, being from neceſſity, is excuſed in point of law: but here, the whole queſtion is, did the *Capel* ſail from *Jamaica* on or before the 1ſt of *Auguſt*, according to the true ſenſe and

* P. 331

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meaning of the policy. If ſhe had fairly commenced her voyage, on her departure from *St. Anne's*, and the going to *Bluefields* is to be taken as the uſuage of the voyage, I ſhould think the underwriters would be liable. So, if ſhe had broken ground for the voyage, and had gone but a league, and been blown back again. But if ſhe had found no convoy at *Bluefields*, ſhe could not have ſtaid there to wait for convoy: that would have vacated the policy. So, if her going to *Bluefields* is to be conſidered only as a continuation of her ſtay at *Jamaica*, the policy is at an end. She certainly was ready at *St. Anne's* to depart for the voyage: and ſhe went to *Bluefields*, not to take in part of her cargo; (for then it would clearly not have been a commencement of the voyage) but from a moſt juſt motive. Whether that was or was not a commencement of the voyage, is clearly a matter of fact; and in this caſe a very material one; therefore ought to be very fully conſidered.

Mr. Juſtice *Willes*.—This is clearly a matter of fact. I think if the ſhip upon her arrival at *Bluefields* had found no convoy, ſhe could not have ſtaid there; but muſt have ſailed immediately: or if ſhe had met with convoy, and had ſtaid an unreaſonable time for other ſhips, the inſurers would not have been liable.

After theſe opinions, which evidently lean in ſupport of the verdict, had been delivered, the court took further time to deliberate; and then their unanimous opinion was pronounced by

Lord *Mansfield*. We are all ſatisfied that the truth of the caſe is, that the voyage from *Jamaica* to *England* began from *St. Anne's*. That when the ſhip ſailed from *St. Anne's*, ſhe had no view or object whatſoever, but to make the beſt of her way to *England*. That the value of this queſtion, admitted on both ſides, ſhews, that every other ſhip under the ſame circumſtances looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the ſafeſt

*P. 332 * courſe of navigation from *Jamaica* to *England*; and that it would have been unwiſe and imprudent for any ſhip not to have touched there. The great diſtinction is this: that ſhe ſailed from *St. Anne's* for *England*, *by way of Bluefields*; and that it was not a voyage from *St. Anne's* to *Bluefields* with any object or view diſtinct from the voyage to *England*. If ſhe had gone firſt to *Bluefields* for any purpoſe independent of her voyage to *England*, to have taken in water, or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from *St. Anne's* to *Bluefields*; and another from *Bluefields* to *England*. But here, under all the circumſtances, we think

ſhe

ſhe had no other object than to come directly to *England* by the ſafeſt courſe. Therefore the rule for a new trial was made abſolute.

A few years afterwards a ſimilar deciſion was made: and the only difference between the caſes was this, that in the caſe now to be mentioned, it was a condition inſerted in one of her clearances, that ſhe ſhould paſs *by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. But this was not thought ſufficient to induce the court to depart from the deciſion in *Bond* and *Nutt*; eſpecially as in this caſe, the place where the ſhip was detained was in the direct courſe of the voyage.

It was an action on a policy of inſurance on the *French* ſhip *L'aimable Gertrude*, "at and from *Guadaloupe* to *Havre*, "*warranted to ſail on or before the 31ſt of December.*" It was tried before Lord *Manſfield*, when a verdict was found for the plaintiff. A motion having been made for a new trial, the caſe from his Lordſhip's report, appeared to be as follows: *The ſhip took in her complete lading and proviſions for France, and all her clearances and papers*, at a port, called *Pointe a Pitre*, in the iſland of *Guadaloupe*, and *ſailed from thence on the* 24th *of October*, for *Baſſe-terre*, where there is no port, but only an open road. The town of *Baſſeterre* is the reſidence of the *French* governor. The ſhip arrived there at night, when the captain went on ſhore, and next day waited on the governor, who would not permit him to depart, and to prevent it, took *his ſhip's papers from him. At this place he was detained with his ſhip till the 10th of *January*, when he ſet ſail with a convoy, which had arrived ſome little time before, and being ſeparated after ſome days from the convoy, the ſhip was taken by an *Engliſh* veſſel. The captain, who was the only witneſs produced at the trial, ſwore, that notice had been given on the part of the governor, ſome days before he ſailed, to him and the other captains of ſhips at *Point a Pitre*, who were preparing to ſail for *Europe*, that a convoy was expected to be at *Baſſeterre* from *Martinico*, on the 25th of *October*, and that, in conſequence of this intimation, he had worked night and day to get ready, and had paid extraordinary gratifications to obtain the ſhip's papers and clearances as ſoon as poſſible; that the deſire of being in time for the convoy was the only reaſon for this haſte; and that, although he was not able to ſail till the 24th, he was ſtill in hopes of being in time for the convoy, as he thought it might very probably have been detained at *Martinico* ſome days beyond its time. The laſt ſhip paper, which he received at *Point a Pitre*, was *Le Role d'equipage*, or the muſter roll. This paper, which was much relied upon

Thelluſſon v. Ferguſſon. Doug. 346.

* P. 333

by

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by the counſel for the defendant, was dated the 24th of *October*, and was in the following words: " Vu par nous, chargé du " detail des claſſes au department de La Grande terre *Guada-* " *loupe*, l'equipage denommé au role des autres parts au nom- " bre de vingt perſonnes, le capitaine compris. Permis au " Sieur *Jean Jacques Lethuillier* commandant le navire *L'ai-* " *mable Gertrude* du *Havre*, de s'en ſervir pour faire ſon re- " tour au dit lieu, *paſſant a la Baſſeterre pour y prendre les or-* " *dres du gouvernement* en obſervant les ordonnances et regle- " mens de la marine." Under this there was written, on the ſame paper, an account, dated the 30th of *October*, of ſome changes in the number of the crew, and under that, the following entry. " Vu par nous, ecrivain de la marine chargé " du detail des claſſes, les vingt cinq perſonnes exiſtantes au " preſent rôle, le capitaine compris. Il eſt permis au Sieur *Le-* " *thuillier* commandant le navire *L'aimable Gertrude*, du *Havre*, " de faire ſon retour au dit lieu en ſe conformant aux ordon- " nances et reglemens royaux de la marine. A *Baſſeterre* " *Guadaloupe*, le 2 *Janvier*, 1779." On another paper, called Le Congé, dated the 16th of *October*, which was read on the * P. 334 * part of the plaintiff, there was written, at the bottom, as follows: " Vu de relache a la *Baſſeterre Guadaloupe*, pour y " attendre un convoi pour *France*. Ce 28 *Octobre*, 1778, " *Monentheil.*" The captain ſwore, that he underſtood the only reaſons for the condition in the muſter roll, that he ſhould go to *Baſſeterre*, were, the convoy was to be at that place, and that he might take ſuch diſpatches as were ready for *Europe*. He had not objected to it; becauſe in the regular courſe of his voyage to *France* from *Pointe a Pitre*, he muſt have gone that way, cloſe under the guns of *Baſſeterre*, in order to avoid *Montſerrat*, there being no other road, except they were to keep quite to the leeward, which is not the cuſtom. If he had arrived there in the day-time, he would not have caſt anchor, but would have ſent his boat for the diſpatches; but having arrived at night, his ſhip had been detained, contrary to his intention and expectation. The defendant's counſel to invalidate the captain's teſtimony, beſides the muſter roll, and the entry under it, as above ſtated, read the proteſt made by the captain on his arrival at *Dover*; and alſo his depoſition in anſwer to the 29th interrogatory in the proceedings in the Admiralty on the condemnation of the ſhip. The words of the proteſt, on which they relied, were as follows: " Where- " upon he (the captain) waited on the proper officer at *Pointe* " *a Pitre* for his muſter roll, and was by him informed, it " could not be granted, but on condition that he ſhould firſt " ſail to *Baſſeterre*, and *there wait* the directions of the gene- " ral of the iſland." And in a ſubſequent part, " Whereupon " at

" at his (the captain's) inſtance, the ſaid *John Nicholas Le-*
" *thuillier*, his father came to *Baſſeterre*, and went with Meſſrs.
" *Gobert* and *Boteul*, commiſſioners of commerce, to the ſu-
" perintendant, and alſo to the general of the iſland, ſtating to
" them that the ſaid ſhip and cargo were inſured upon condi-
" tion that ſhe ſhould have departed from the iſland of *Guada-*
" *loupe* before the 31ſt of *December*, the terms of which inſurance
" they judged it eſſential to fulfil, notwithſtanding which, they
" were ſtill refuſed permiſſion to depart, and were kept there
" until after the 31ſt of *December*." The depoſition relied on was as follows: " At the time the ſhip was firſt purſued and
" taken, ſhe was ſteering her courſe towards *Breſt*. Her
" courſe was not altered upon the appearance of the veſſel,
" * by which ſhe was taken. Her courſe was at all times, * P. 336
" when the weather would permit, directed to *Breſt*, for
" which port ſhe was directed to ſail, although the deſtination
" was for *Havre de Grace*, by the ſhip's papers. She was not,
" before nor at the time of the capture, *ſailing beyond or wide*
" *of Havre de Grace*. She was then about eight leagues weſt
" of *Uſhant*, and her courſe was not altered to any other port
" or place, but was obliged to be directed to *Breſt*, in conſe-
" quence of the orders he had received, ſubſequent to the
" delivery of the ſhip's papers." In anſwer to the 27th interrogatory, his depoſition was, " That all the ſhip's papers
" found on board were true and fair, and none of them falſe
" and colourable." At the trial the captain ſwore, that he had received directions to keep in the courſe to *Breſt* at *Baſſeterre* from his father, who had formerly commanded the ſhip; *but this was done as the ſafeſt way in time of war, of getting to Havre, which ſtill continued to be the place of the ſhip's deſtination.* Upon this evidence, the defendant's counſel made two objections, as grounds for a new trial: 1ſt. That there had been no inception of the voyage on the 24th of *October*, nor till after the 31ſt of *December*: 2dly. That the ſhip never ſailed on the voyage inſured, *viz.* from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Breſt*. After both theſe points had been fully argued at the bar,

As to the 2d point, vide ante c. 17i P. 314.

Lord *Mansfield* ſaid: In my apprehenſion, there is no contradiction between the parole evidence, and the proteſt and depoſitions. This captain had never heard of the caſe of *Bond* and *Nutt*. Under an inſurance at ſuch a place as *Guadaloupe* or *Jamaica*, the ſhip is protected in going from port to port in the iſland. But the queſtion here is, whether the voyage was *bona fide* commenced; and ſtopt by accident. As to the condition about taking the orders of government, the ſhip could not ſail from any part of the iſland without the governor's leave. But the captain, when he left *Pointe a Pitre*, expected to meet a convoy at *Baſſeterre*, and to proceed immediately

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mediately without interruption. A convoy had been publiſhed, and he certainly would have gone to *Baſſeterre* at any rate, independent of the clauſe in the muſter roll. With regard to the ſecond point, the voyage to *Breſt* was, at moſt, but an intended deviation, not carried into effect.

Vide c. 17.

* P. 336 See Lord Mansfield's opinion in the caſe of Bond v. Nutt, where he quotes the caſe alluded to.

* Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Mr. Juſtice *Buller*.—The caſe in 1777 between the ſame parties is in point. There was no embargo there, nor in the preſent caſe, when the ſhip ſailed. There muſt be a lawful *bona fide* ſailing, which I think there was in this caſe. The ſhip was completely ready in all reſpects. The rule for a new trial was therefore diſcharged.

See the Introduction for the Hiſtory of the Conſolidating Rule.

Notwithſtanding the uniformity of deciſion in all theſe caſes, the judgment given in the laſt cauſe was not ſatisfactory to about twenty other underwriters upon the ſame policy, nineteen of whom obtained leave to conſolidate their different cauſes, upon the uſual terms, in order to bring the queſtion once more into court. Accordingly, in the enſuing ſittings, the cauſe was ſet down for trial.

Thelluſſon v. Staples. Sittings at Guildhall. Eaſt. Vac. 1780.

In this cauſe, the ſecond point as to the deviation was abandoned; and on the firſt, the ſame evidence was given as upon the former occaſion. The point was again fully argued for the defendant.

Lord *Mansfield*.—The ſingle queſtion on this policy is, whether the ſhip ſailed on her voyage to *Havre* before the 31ſt of *December*. She certainly ſailed from *Pointe a Pitre* completely loaded before that time. The doubt on the firſt queſtion of this ſort was this: the policy was "at and from *Jamaica*;" now the word *at* certainly comprizes the whole iſland, and, under that word, you may ſail from one port to another everywhere along the coaſt of the iſland. The ſhip therefore, in that ſenſe, was ſtill at *Jamaica*, after ſhe got to *Blueſields*. She did not leave *Blueſields* till after the day named in the warranty, and that place was quite out of the courſe of navigation from *St. Anne's* to *England*. I own, at the trial, I thought the voyage to *England* did not commence till the ſhip ſailed from *Blueſields*, and according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wiſhed (as I always do in ſuch caſes) that the opinion of the court might be taken, in order to ſettle the point. The caſe, when it came on in court, was very ably argued; I was completely convinced, and the court were unanimouſly of opinion, that the voyage to *England* began when the ſhip ſailed from *St. Anne's*; and upon the ſecond trial, the plaintiff had a verdict.

* P. 337 Earle v. Harris At Guildhall. Hil. Vac. 1780.

Earle and *Harris* was ſtill a ſtronger caſe. *There* an embargo was actually publiſhed, before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a proteſt, and ſent his ſhip knowingly into the embargo: but he ſwore that he expected the embargo

embargo was to be taken off, and that he ſhould proceed immediately upon his voyage; and the jury believed him. In this caſe to go by ſteps. There was public notification of a convoy to be at *Baſſeterre* on the 25th of *October*. The captain thought that it might be ſtopped a day or two at *Martinico*, and that he ſhould get to *Baſſeterre* in time. He worked night and day, paid double fees for his papers, and ſailed with full expectations of purſuing his voyage directly. He knew of no embargo, and *Baſſeterre* was directly in his road. In that reſpect, this caſe differs ſtrongly from *Bond* v. *Nutt*. He was even in the regular voyage obliged to paſs under the cannon of *Baſſeterre*. He had his muſter-roll, on condition of calling there; but he made no difficulty of taking it on that condition, becauſe he knew he muſt paſs that way at all events. Did he not *bona fide* begin his voyage? He certainly had no idea, when he ſailed from *Pointe a Pitre*, of meeting with any ſtop. So it was in the former caſe of *Thelluſſon* v. *Fergusſon*. There was no idea of the embargo in that caſe, when the ſhip ſailed. Here there is not the leaſt ſuſpicion of fraud. This captain certainly did not know of the deciſion in *Bond* v. *Nutt*. He thought, when he was detained at *Baſſeterre* beyond the 31ſt of *December*, that the policy was forfeited, which is a ſtrong circumſtance in the plaintiff's favour, for it ſhews that the ſailing was not colourable. This queſtion has undergone the conſideration of a ſpecial jury and of the court. Underwriters have a right to litigate queſtions, which ſeem to them to be in their favour. But, at laſt, there ſhould be an end of litigation. If you ſhould be of the ſame opinion with the former jury and the court, you will find for the plaintiff: which they did accordingly. The cauſe of the twentieth underwriter, on the ſame policy, who refuſed to conſolidate, ſtood next in the paper for trial; but upon the above verdict being given, his counſel conſented that a verdict ſhould alſo be entered againſt him.

The Grenada Caſe Vide Supra.

* From this long train of uniform and conſiſtent determinations, it ſhould ſeem that the queſtion, what ſhall or ſhall not be a departure within the meaning of the warranty is now completely ſettled. In inſurances *at and from London* warranted to depart on or before a particular day, it has long been a queſtion, what ſhall be a departure from the port of London; or rather what is the Port of London? and it is ſingular, that this point has never yet been judicially determined. On the one hand it is ſaid, that the moment a ſhip is cleared out of the cuſtom houſe and has all her cargo on board, if ſhe quit her moorings in the river on or before the day warranted that the warranty is complied with. On the other ſide it is contended, and with great appearance of reaſon, that a ſhip is not ready for ſea, till ſhe has got her cuſtom houſe cocket on board, which is the final clearance, and which ſhe cannot have till ſhe arrives at Graveſend: that till this cocket

* P. 338

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is received, the ſhip dare not proceed to ſea under a penalty, and till then is not entitled to the drawbacks, and that Graveſend is always conſidered as the limits of the Ports of London, and unleſs the ſhip ſail from thence on or before the day limited, there is no inception of the voyage, and the policy is forfeited.

Rogers v. Royal Exchange Aſſu. Comp. Sittings in C. P. after Mich. 1787, before Lord Loughborough.

In a late caſe, the Royal Exchange Aſſurance Company reſiſted a demand made upon them, in order to try this great queſtion: but as it appeared from the evidence of the log book that the ſhip did not in truth break ground till after the day named in the warranty, the plaintiff was nonſuited; and the queſtion remains undecided.

Poſtlethw. Dict. tit. Convoy.

The ſecond ſpecies of warranty, which moſt frequently occurs in inſurances, is that of ſailing under the protection of convoy; that is, certain ſhips of force, appointed by government, in time of war, to ſail with merchantmen from their port of diſcharge to the place of their deſtination. When the nature of a convoy is conſidered, it is highly reaſonable, that the policy ſhould be forfeited, if the inſured fail to comply with ſo material a condition; becauſe the riſk which the underwriter takes upon himſelf is very conſiderably increaſed, in time of war, by the want of convoy. Accordingly, by the laws of this, and of all other maritime powers, if the inſured warrant that the veſſel ſhall depart with convoy, and it do not; the policy is defeated, and the underwriter is not reſponſible. We have already ſeen, * that every warranty muſt be ſtrictly and literally complied with; and that a liberal and ſubſtantial performance merely will not be ſufficient. Hence in a warranty to ſail with *convoy*, it becomes material to conſider, what ſhall be deemed *a convoy* within ſuch a condition. Upon this point, it has been ſolemnly ſettled by the court of King's Bench, Mr. Juſtice *Willes* excepted, who differed from the other learned judges upon that occaſion, that it is not every ſingle man of war, which chuſes to take a merchant ſhip under its protection, that will conſtitute ſuch a convoy as a warranty means; but it muſt be a naval force under the command of a perſon appointed by the government of the country to which they belong. The reaſon of ſuch a deciſion is wiſe; becauſe government muſt be ſuppoſed to be better informed of the deſigns and ſtrength of the enemy, and what degree of force will be ſufficient to repel their attempts. In the caſe, in which theſe points were ſettled, it alſo became a queſtion, how far ſailing orders from the commander in chief to the particular ſhip or ſhips, were requiſite to the conſtitution of a convoy. But it was not thought neceſſary to decide that point, although it ſeemed to be the opinion of the majority of the judges, that they were not abſolutely eſſential.

1 Emerigon, Traite des Aſſurances, p. 164.

* P. 339

Hibbert v Pigon. B. R. Eaſter. 23 Geo. 3. 1783

This caſe came before the court upon a rule to ſhew cauſe why the verdict, which the defendant had obtained, ſhould not be ſet aſide, and a new trial had. It was an action upon a policy

of

of inſurance on the ſhip *Arundel*, captain *Mann*, at and from *Jamaica* to *London*, *warranted to depart with convoy*. The inſurance was at 18 guineas *per cent.* to return 3 *per cent.* if the ſhip ſailed on or before the firſt of *Auguſt*. The facts appearing on the report of Lord *Mansfield*, who tried the cauſe, are theſe: On the 25th of *July* the *Arundel* ſailed from *Morant* harbour to *Kingſton*, where ſhe met the *Glorieux* man of war, Captain *Cadogan*, who was likewiſe on his way to join Admiral *Graves* at *Bluefields*. Lord *Rodney* had appointed Admiral *Graves* to rendezvous at *Bluefields*, in order to take the fleet of merchant ſhips, which were to ſail from thence upon the firſt of *Auguſt* under his command, and to convey them to *Great Britain*, Captain *Mann*, upon their meeting in *Kingſton* harbour, aſked for ſailing orders from captain *Cadogan*, who ſaid, he had none, not having himſelf at that time joined the Admiral: But he was ſure that admiral *Graves* would not ſail from *Bluefields* till the * *Glorieux* joined him. However, if he ſhould have ſailed, he, Captain *Cadogan*, would give Captain *Mann* ſailing orders, and take every care of the *Arundel* in his power. They proceeded together and arrived at *Bluefields* on the 28th of *July*; but they found that Admiral *Graves* had ſailed two days before. The *Glorieux* and *Arundel* then ſailed from *Bluefields*, the former firing guns, giving ſignals, and behaving in every reſpect *like a convoy*. Upon the fifth of *Auguſt* a ſignal was made, that the fleet was in ſight; and on the ſeventh they joined the fleet off *Cape Anthonio*. The *Arundel* was afterwards loſt in *September*, in a dreadful ſtorm, which diſperſed the whole fleet, and in which a vaſt number of the ſhips periſhed. Upon this evidence the jury were of opinion, under the direction of the Chief Juſtice, that the terms of the warranty had not been performed, and they therefore found a verdict for the underwriters, the defendants. After this queſtion had been fully argued at the bar, the three judges, Mr. Juſtice *Aſhhurſt* being, at that time, one of the Lords Commiſſioners of the Great Seal, delivered their opinions ſeverally.

* P. 340

Lord *Mansfield*.—Though the underwriters and inſured are equally innocent; yet I cannot help ſaying, that now, as well as at the trial, my inclination led me to wiſh, that the plaintiffs were in the right. But the more it is argued, it is the leſs liable to diſpute. There are hypothetical contracts and conditional contracts. In the former the contract depends upon an event taking place; there is no latitude; no equity; the only queſtion is, has that event happened? But conditional contracts admit of a more liberal conſtruction. Now the only queſtion upon this contract is, whether the ſhip has departed with convoy. A great deal muſt be referred to the uſage of merchants. The government appoints a convoy for the trade, and alſo names a place of rendezvous. Then comes the reference

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rence to the uſage of merchants; the voyage is begun at *Kingſton*; but the riſk only commences at *Bluefields*. Now though Lord *Rodney* deſires the captain of the *Glorieux* to take any ſhips he may pick up in his way, and convoy them to *Bluefields*; yet the warranty in the policy by the uſage, does not require convoy to *Bluefields*. The ſecond reference to the uſage of merchants is, what is eſteemed a convoy by merchants.

* P. 341 * *A convoy is a naval force, under the command of that perſon, whom government has appointed.* They truſt to the knowledge of government which muſt be ſuppoſed to be better acquainted with the plans and force of the enemy, and with the ſtrength neceſſary to repel their attempts. Now this is the general uſage, to which matters of this kind are referred Then let us ſee what the caſe is here.—Lord *Rodney* appoints Admiral *Graves* to go with ten ſail of the line to *Bluefields*; and from thence to convoy the *Jamaica* trade to *Great Britain*. When they come to the place of rendezvous, they take ſailing orders from the Admiral, *which are eſſential to convoy*, as by them they know the ſignals, for what places they are to ſteer, in caſe of diſperſion by ſtorm, or any other juſt cauſe. Admiral *Graves*, on the 26th of *July*, for reaſons beſt known to himſelf, thinks he has got all the ſhips, for which he ought to ſtay, and proceeds on his voyage. He leaves no order for the *Glorieux* to follow him to *Cape Anthonio*; and though it is very true, that it is in the power of the Commander in Chief to change the place of rendezvous, yet in this caſe it is not true, as was ſuppoſed in argument, that *Cape Anthonio* was appointed. At the time of ſailing from *Bluefields*, the *Glorieux* was no part of the convoy; for ſhe did not come there till two days after the fleet was gone. Upon theſe facts it did appear to me, and to the jury at the trial, that the warranty was not complied with: I continue of the ſame opinion now; and that this rule ſhould be diſcharged.

Mr. Juſtice *Willes*.—I cannot perfectly coincide with every thing which Lord *Mansfield* has laid down. The form of the contract is in general words, "*to depart with convoy*," without mentioning any particular day, or pointing out any ſpecifick convoy. The terms of the policy ſeem to me to have been literally and ſubſtantially complied with; for there was no *laches* on the part of the *Arundel*; ſhe came with all poſſible expedition, and was at *Bluefields* two days before the time appointed for ſailing. When captain *Mann* found that the fleet was gone, he did every thing in his power for the ſecurity of the ſhip; for he put himſelf under the protection of the *Glorieux*, which was appointed by Lord *Rodney* to make a part of the convoy; and it appears in evidence, that in every reſpect Captain *Cadogan* behaved as a convoy. I have ſearched a good deal for caſes; and

* P. 342 * I can only find one in *Strange* 1250, upon the ſubject of ſailing orders; and I do not think that caſe goes ſo far as to ſay, that

ſailing

failing orders are eſſential to a convoy. The loſs of the *Arundel* happened long ſubſequent to her joining the fleet; and I am therefore of opinion, that the warranty in this policy has been ſubſtantially performed.

Vide Poſt. P. 348.

Mr. Juſtice *Buller*.—In deciding this caſe, it is not neceſſary to ſay whether failing orders are eſſential or not: as at preſent adviſed, I do not ſay that they are abſolutely neceſſary. The preſent queſtions ſimply this: did the *Arundel* ſail with convoy. This is a condition which muſt be literally complied with, as all the caſes agree. As to the queſtion itſelf, it is undoubtedly a queſtion of fact: and the caſe facts ſeem to me to prove, that the *Glorieux* was no part of the convoy. Admiral *Graves* had ſailed before they arrived; and that circumſtance, which my Lord ſtated, ſeems very material, that no orders were left behind for the *Glorieux*. I ſay that, on this evidence, ſhe was not a part of the convoy: for in order to make her ſo, it muſt appear that ſhe was under the orders of *Graves*. Did he leave her behind to take care of the ſhips that remained? If ſo, it would alter the caſe very materially. But there was no ſuch idea; for if there had, the *Glorieux* would have remained at *Blueſields* for the reſt of the ſhips, until the firſt of *Auguſt*. on the contrary, Captain *Cadogan*, finding that Admiral *Graves* was gone, immediately followed; for his ſole object was to join Admiral *Graves*. *Ships muſt ſail under the convoy appointed by the government of the country*, who proportion the ſtrength of it to the neceſſity of the times. To what end would this care be taken, if merchantmen were to ſail under the protection of ſingle ſhips, with which they may happen to meet? I am therefore of opinion, that if a ſhip do not ſail with the convoy appointed by government, it is not a ſailing with convoy, within the terms of the policy. The rule for a new trial was therefore diſcharged. (*a*)

* Although the deciſions of the court of King's Bench require no additional authority to ſupport them; yet it will be proper, merely by way of illuſtration, to point out to the reader, in what caſes the opinions of foreign writers agree with the determinations of the *Engliſh* courts of juſtice Monſieur *D'Emerigon*, a very diſtinguiſhed *French* writer upon this branch of juriſprudence, puts this caſe: "On avoit fait des aſſurances ſur un

*P. 343

1 Emerigon p. 171.

(*a*) Another action was brought upon the ſame policy againſt another of the underwriters; and altho' a verdict in that caſe was found for the plaintiffs; yet it ſeems to me to leave the doctrines above advanced unſhaken; for upon the ſecond trial it was proved beyond all doubt, that the Glorieux was in truth a part of the convoy, a fact, which was left doubtful on the firſt; and it was upon that fact that Lord Mansfield and Mr. Juſtice Buller chiefly relied.

Sittings at Guildhall before Mr. Juſt. Buller after Eaſt. Term 1714.

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" navire, de ſortie de *Marſeille* juſqu' aux Detroits de *Gibraltar*, " et dans la police il étoit dit que le navire partiroit de *Marſeille* " *ſous l' eſcorte d'un batiment de roi*; *autrement, aſſurances nulle.* " Une fregate, chargëe de munitions de guerre pour *Algeſiras*, " ſe trouvoit à *l' Eſtaque*.. Le navire aſſuré mit â la voile ſous " les auſpices de cette fregate qui lui accorda protection, et qui " partit en meme temps. Conſultè ſur ce cas, je fus d'avis que " ſi le navire êtoit pris par les ennemis, les aſſureurs ſeroient " fondës a refuſer le payment de la perte : *car autre choſe eſt* " *a'etre ſous l'eſcorte d'un batiment de roi, et autre choſe eſt de* " *naviguer ſimplement ſous ſes auſpices.*"

See the Caſe

From the caſe of *Hibbert* and *Pigou* we collect this; that a convoy appointed by the Admiral, commanding in chief upon a ſtation abroad, is a convoy appointed by government. And beſides the inſtruction it affords, applicable to the particular ſubject, for which it was here inſerted, it ſerves to eſtabliſh ſome principles laid down at the beginning of this chapter; that whether the loſs do or do not happen, on account of the breach of the warranty, ſtill the policy is forfeited: for in this caſe, the ſhip inſured perithed in a ſtorm, long after ſhe had joined the regular convoy; and conſequently the loſs did not happen, on account of the breach of the condition.

Having ſeen what ſhall be deemed a convoy, let us proceed to conſider what ſhall be a *departure* with convoy, within the meaning of a warranty to *depart with convoy*. The rule on this point is ſhort and clear, that ſuch a warranty implies, that the ſhip ſhall go with convoy from the uſual place of rendezvous, at which the ſhips have been accuſtomed to aſſemble; as *Spithead*, or the *Downs* for the port of *London*; and *Blueſields* for all the ports in *Jamaica*. And from the particular port to ſuch uſual place of convoy, the ſhip is protected by the policy.

* P. 344

Lethulier's Caſe. 2 Salk. 443.

* Thus in an action on a policy of inſurance by the defendant at *London*, inſuring a ſhip from thence to the *Eaſt Indies*, *warranted to depart with convoy*; the declaration ſtates, that the ſhip went from *London* to the *Downs*, *and from thence with convoy*, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration, to which it was objected, That here was a departure without convoy.

PerCuriam.

The clauſe, warranted to depart with convoy, muſt be conſtrued according to the uſage among merchants, that is, from ſuch place, where convoys are to be had, as the *Downs*, &c.

It is true, Lord Chief Juſtice *Holt*, upon that occaſion, was of a different opinion; but the judgment of the other judges was relied upon and confirmed in the following caſe by Lord Chief Juſtice *Lee*, and has alſo been recognized in ſeveral other caſes, in which the queſtion has come collaterally before the court. Indeed of late years, it has been tacitly acquieſced

acquieſced in; for there never is a convoy from the port of *London*.

On an inſurance from *London* to *Gibraltar*, *warranted to depart with convoy*, it appeared that there was a convoy appointed for that trade at *Spithead*, and the ſhip *Ranger*, having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The inſurers inſiſted, that this being the time of a *French* war, the ſhip ſhould not have ventured through the *Channel*, but have waited in the *Downs* for an occaſional convoy. And many merchants and office-keepers were examined to that purpoſe. But Lord Chief Juſtice *Lee* held, that the ſhip was to be conſidered as under the defendant's inſurance *to a place of general rendezvous*, according to the interpretation of the words, "warranted to depart with "convoy." *Salk.* 443. And if the parties meant to vary the inſurance from what is commonly underſtood, they ſhould have particularized her departure with convoy from the *Downs*. The jury was compoſed of merchants, who found for the plaintiff, upon the ſtrength of this direction. Gordon v. Morley. 2 Stra. 1265

* A ſimilar deciſion was made in the year 1781, by the Admiralty of *France*, which is reported in the work of *Emerigon*. * P. 345

Upon this kind of warranty, it is to be obſerved, that although the words commonly uſed are, "to *depart* with con- "voy," or, "to ſail with convoy;" yet they extend to ſailing with convoy throughout the whole of the voyage, as much as if thoſe words were inſerted. Indeed to ſuppoſe the contrary would introduce an infinite variety of frauds; as a ſhip would ſail out of harbour with the convoy, continue with it for an hour or two, then leave it, and run every peril, at the riſk of the underwriter. If, therefore, the convoy is only to go a part of the way, that is not a compliance with the warranty; and the inſurer is diſcharged from his engagements. Tom. 1. p. 166. 2 Salk. 443.

This was one of the points ruled in *Jeffreys* v. *Legendra*, that will be quoted at length preſently, in which Lord Chief Juſtice *Holt* and the reſt of the court held, that although the words of the policy only were "to depart with convoy," yet they extend to ſail with convoy throughout the whole voyage. 3 Levins 320.

In a more modern caſe, however, this doctrine came again in queſtion; and after very full conſideration, the opinion of Lord *Holt* was unanimouſly confirmed by the whole court of King's Bench.

It was an action for money had and received, brought againſt an underwriter for a return of premium. The policy was on the ſhip the *Parker Galley*, "at and from *Venice* to "the *Currant Iſlands*, at and from thence to *London*," at a premium of 5 guineas *per cent*. "to return 2 *per cent* "*if the ſhip ſailed with convoy from Gibraltar*, and arrived." The Lilly v. Ewer. Doug. 72.

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ſhip touched at *Gibraltar* on her way home, and ſailed from thence under convoy of the *Zephyr* ſloop of war, *but the convoy was deſtined only to go to a certain latitude, as far as Cape Finiſterre*, being ordered on the *Liſbon* ſtation; and accordingly the ſhip and convoy ſeparated, and the ſhip arrived ſafe at *London*. The only queſtion in the cauſe was, whether, by the terms of the policy, the condition for the return of premium was a *departure from Gibraltar with ſuch convoy as could* * P. 346 * *be met with, for whatever part of the voyage that might happen to be, or a departure with convoy for the voyage.* The trial came on before Lord *Mansfield* and a common jury, when a verdict was found for the plaintiffs.

A rule having been obtained to ſhew cauſe why there ſhould not be a new trial; the evidence from his Lordſhip's report, appeared to be thus: That the plaintiffs had called witneſſes (one of whom was Mr. *Gorman*, an eminent merchant) to prove that for ſome years paſt, when convoy *for the voyage*, or *the whole voyage* was intended, thoſe explanatory words had been added, and that, by this uſage, the expreſſions of "*ſailing* "*with convoy*," and "ſailing with convoy for the voyage," had received diſtinct technical meanings: "with convoy," ſignifying whatever convoy the ſhip ſhould depart with, whether for a greater or leſs part of the voyage. Several policies were alſo produced, which had been filled up at the office of the ſame broker, who had prepared that which had given occaſion to this cauſe, in which the words, "for the voyage," or "for "*England*," were added. The captain proved, that at the time when he left *Gibraltar*, no other convoy was to be had. The witneſſes for the defendant ſwore, that they underſtood the words "with convoy," to mean, *convoy for the voyage*; and the broker ſaid, that, at the time this policy was ſigned, he underſtood, and apprehended it was ſo underſtood by all the parties, that the convoy was to be for the voyage, and that the return was ſuch as was uſual, when convoy for the voyage was meant. His Lordſhip, after ſtating the evidence ſaid, that when the caſe was opened, he thought, on the face of the policy, that the words muſt mean for the voyage. He had not admitted the counſel to aſk the opinion of the witneſſes on the conſtruction; but to learn whether there was any uſage in this caſe, which would give a fixed technical ſenſe to the words. This was a queſtion of fact to be aſcertained by evidence, and proper for the conſideration of a jury.

The caſe was fully argued at the bar.

Lord *Mansfield*. On the words I was ſtrongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with con- * P. 347 * voy, which might be deſigned to ſeparate from the ſhip in a minute or two; though when convoy for the whole of a voy-

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age is clearly intended, an unforeſeen ſeparation is an accident, to which the underwriter is liable; for the meaning of ſuch a warranty is not that the ſhip and convoy ſhould continue and arrive together. But ſtill I think that the evidence was properly admitted at the trial of this cauſe; becauſe the ſenſe contended for by the plaintiffs, was not inconſiſtent with the words of the policy, and therefore it was material to ſee what the uſage was. I laid great ſtreſs on Mr. *Gorman's* teſtimony. I did not conſider him as a common witneſs. However, it ſeems, from what I have heard ſince, that people in the city are diſſatisfied with the verdict, and think the evidence of the plaintiff's witneſſes was founded on a miſtake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words neceſſary, and multiply them, you alſo multiply doubts and criticiſms. It may be hard, becauſe words have been added in ſome inſtances, to force a conſtruction in this caſe, from the omiſſion of them. The queſtion is of great importance. The rule was therefore made abſolute.

The new trial came on before Lord *Mansfield* at the ſittings after *Trinity* term, 19 *Geo.* 3. when a verdict was found for the defendant, the inſurer. Doug. p. 74. note (7)

But although it has been thus ſettled, that a ſhip muſt depart with convoy for the whole of the voyage; yet in the laſt caſe, it was truly ſaid by Lord *Mansfield*, that an unforeſeen ſeparation is an accident, to which the underwriter is liable. It is the law of reaſon and common ſenſe; for it would be the height of injuſtice and cruelty to heap misfortune upon misfortune, and to ſay, that becauſe a ſhip has been ſeparated from her convoy by ſtreſs of weather, or the fury of the elements, that the inſured ſhall ſuffer ſtill greater miſery, by being deprived of that indemnity which he had ſecured to himſelf by paying a ſufficient and adequate premium. The law of *England* does not tolerate ſuch principles; and the firſt deciſion upon the ſubject was ſuch, that it never has been departed from in any inſtance. Doug. 73. 1 Emerigon. 166.

* Aſſumpſit on a policy of inſurance made in the uſual form, "from *London* to *Cadiz*, warranted to depart with convoy." Upon the general iſſue pleaded, the jury found a ſpecial verdict, ſtating, that the ſhip did depart from the port of *London*, in company of the convoy intended, and ſailed together as far as the *Iſle of Wight*, in purſuance of the voyage towards *Cadiz*; and there they were ſeparated by ſtreſs of weather; that the convoy put into *Torbay*, and the inſured ſhip into the port of *Fowey* in *Cornwall*. That three days afterwards, the wind ſetting right to bring the convoy down the channel, the maſter of the inſured ſhip ſailed out of *Fowey* on purpoſe to meet the convoy; but it did not come: and then the inſured ſhip was ſeized with * P. 348 Jeſſery v. Legendra 3 Lev. 320. 2 Salk. 443 Carth. 216 1 Shower, 320. 4 Mod. 58. S. C.

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another ſtorm, ſo that ſhe could not return from whence ſhe came. but was driven upon the *French* coaſt, and there taken by ths enemy.

Carthew, 216.

After ſeveral arguments of this ſpecial verdict, the plaintiff had judgment *per totam curiam*; and their principal reaſon was, becauſe there was no manner of neglect, or other default found in the maſter of the ſhip; but it appeared he had done all in his power to keep in company of the convoy. It is found expreſsly, that he departed with convoy from his firſt port, which anſwers the words of the policy; but it would have been otherwiſe, if any fraud or neglect had been found in the maſter of the inſured ſhip after his departure, notwithſtanding he departed out of the firſt port with convoy; for the meaning of the words "*warranted to depart with convoy*" is, that the inſured ſhip ſhould keep company with the convoy, during the whole voyage, if poſſible.

Even where the ſhip has by tempeſtuous weather been prevented from joining the convoy at all, at leaſt, of receiving the orders of the commander of the ſhips of war, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy, within the terms of the warranty.

Victoria v. Cleeve. 2 Stra. 1250.

The plaintiff had inſured on goods in the *John* and *Jane* from *Gottenburgh* to *London*, with a warranty *to depart with convoy* from *Fleckery*. In *July* 1744, the ſhip ſailed from *Gottenburgh* to *Fleckery*, and there ſhe waited for convoy two months. On the 21ſt of *September*, at nine in the morning,

* P. 349

* three men of war, who had one hundred merchant ſhips in convoy, ſtood off *Fleckery*, and made a ſignal for the ſhips there to come out, and likewiſe ſent in a yaul to order them out. There were fourteen ſhips waiting, and the *John* and *Jane* got out by twelve o'clock, and one of the firſt; the convoy having ſailed gently on, and being two leagues a-head. It was a hard gale, and by ſix in the afternoon, the ſhip came up with the fleet; but could not get to either of the men of war for ſailing orders, on account of the gale of wind It was ſtormy all night, and at day break the ſhip in queſtion was in the midſt of the fleet; but the weather was ſo bad, that no boat could be ſent for ſailing orders. A *French* privateer had ſailed amongſt them all night; and it being foggy on the 22d, attacked the *John* and *Jane* about two, who kept a running fight till dark, which was renewed the next morning, when ſhe was taken. For the defendant it was inſiſted, that this ſhip was never under convoy, nor is ever conſidered ſo, till they have received ſailing orders; and if the weather would not permit the captain to get them, he ſhould have gone back.

Sir William Lee.

But the Chief Juſtice and the jury were both of opinion, that as the captain had done every thing in his power, it was a departing

parting with convoy: and those agreements are never confined to precise words; as in the case of departing with convoy from *London*, when the place of rendezvous is *Spithead*, a loss in going thither is within the policy. So the plaintiff recovered.

But is evident from all that has been said, that if there be an opportunity of convoy; if the convoy throw out repeated signals to join; and by the negligence and delay of the captain of the insured ship, the opportunity be lost, the warranty to depart with convoy, is not complied with, and the underwriter is discharged.

Thus in an action on a policy of insurance tried before Lord *Mansfield*, the plaintiff was nonsuited, there being a warranty to depart with convoy; and it appearing from the evidence, that the commodore of the convoy had made signals for sailing from *Spithead* to *St. Helen's* the night before, and had made repeated signals the next morning from seven o'clock till twelve notwithstanding which, the ship insured had neglected to sail with him, and did not sail till two hours after, in consequence of which, he was taken by a privateer (*a*).

Taylor. v. Woodness. Sittings at Guildhall. Hil. Vac. 4 Geo. 3.

* P. 350

The third and last species of warranty, which falls under our consideration, is that of neutrality; or that the ship or goods insured are neutral property. This condition is very different from either of the two former; for if this warranty be not complied with, the contract is not merely avoided for a breach of the warranty, but it is absolutely void *ab initio*, on account of fraud. This ground was entered upon in the chapter of fraud; and the principle, on which the difference turns, is this. A man may warrant that his ship shall sail with convoy; and if that condition be not complied with, it is not his fault, because it depends upon the acts of other men: but still he is the sufferer, for he loses the benefit of his contract. So also if he warrant to sail on a particular day, and do not, he is guilty of no crime; for that was a circumstance, the performance of which depended on a thousand accidents, such as wind, weather, repair, &c. but as he had expressly undertaken, he loses the effect of his policy by non-compliance. But in neither of these cases, as I have said, is the insured, making such a warranty, guilty of any offence. Not so with him, who warrants property to be neutral. That is a fact, which at the time of insuring, must be within his own knowledge; and if he assert it to be neutral, knowing it to be otherwise, he is guilty of a wilful and deliberate falshood, and incurs moral turpitude. In such a case, therefore, the contract between the parties is absolutely null and void to all intents and purposes.

Vide c. 10.

(*a*) As to the duty of the officers appointed for convoy to merchant ships, see it prescribed in the stat. of the 13 Cha. 2. stat. 1. c. 9. art. 17. which regulations were confirmed by the 22d of Geo. 2. c. 33. s. 2. art. 17.

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Woolmer v. Muilman. 4 Burr. 1410. Blackſt. Rep. 427. Vide ante p. 176.

Thus on a ſpecial caſe reſerved for the opinion of the court, it appeared that an action was brought for the recovery of a total loſs on a policy of inſurance made on goods, on board the ſhip *Bona Fortuna*, at and from *North Bergen* to any ports or places whatſoever, until her ſafe arrival in *London*, "*warranted neutral ſhip and property.*" The ſhip, with the goods ſo being on board her, after her departure from *North Bergen*, and be-
* P. 351 * fore her arrival at *London*, proceeding on her voyage, was, by force of the winds, and ſtormy weather, wrecked, caſt away, and ſunk in the ſeas; and the ſaid goods were thereby wholly loſt. The ſhip called *La Bona Fortuna*, at and before the time ſhe was loſt, *was not neutral property*, as warranted by the ſaid policy. The queſtion was, whether, under ſuch circumſtances, the plaintiff could recover. Lord *Mansfield*, after hearing counſel for the plaintiff, ſtopped thoſe for the defendant, ſaying, the point was too clear to be argued. There was a falſhood, with reſpect to the thing inſured; for he inſured neutral property, when it was not ſo: therefore there *is no contract*. We muſt give judgment for the defendant.

If, however, the ſhip and property are neutral at the time when the riſk commences, this is a ſufficient compliance with a warranty of neutral property: becauſe it is impoſſible for the inſured to be anſwerable for the conſequences of a war breaking out during the voyage. The inſurer takes upon himſelf the riſk of peace or war; they are public events, equally known to both parties.

Eden and Another v. Parkinſon Doug. 705.

The plaintiffs inſured the ſhip the *Yonge Herman Hiddinga*, and her cargo, "at and from *L'Orient* to *Rotterdam*. *warranted* "*a neutral ſhip and neutral property.*" The ſhip being captured in the courſe of her voyage by ſome *Engliſh* men of war, the plaintiffs brought this action againſt the defendant, one of the underwriters on the policy, ſtating in their declaration, that the defendant ſubſcribed the policy on the 28th of *November* 1780, and averring that the ſhip and cargo were, *at that time*, neutral property. The trial came on before Lord *Mansfield* at *Guildhall*, when a verdict was found for the plaintiffs, ſubject to the opinion of the court upon a caſe ſtating, that the ſhip in queſtion ſailed from *L'Orient*, on the voyage inſured, on the 11th of *December* 1780, having the inſured cargo on board, *and both the ſhip and cargo were neutral property at the time of the ſhip's departure from L'Orient*, and ſo continued until the 20th of *December* 1780, on which day hoſtilities having commenced between the *Engliſh* and the *Dutch*, the *Dutch* ceaſed to be a neutral power, and the ſhip and cargo ceaſed to be neutral property. They were taken on the 25th of *December* 1780,
* P. 352 * and condemned as lawful prize, in the Admiralty court, on the 19th of *February* 1781.

Lord

Lord *Mansfield*—Many points have been gone into in the argument on both ſides at the bar, which are not neceſſary for the deciſion of this caſe. For inſtance, there is no doubt but you may warrant a future event. But the ſingle queſtion here is, what is the meaning of this policy. I had not a particle of doubt at the trial, and I know the jury had none; but Mr. *Lee* preſſed for a caſe, and I granted one out of reſpect to him. What is the caſe? It is an inſurance upon a ſhip and her cargo, at and from *L'Orient* to *Rotterdam*. The inſured warrant them neutral, and the defendant would have the court to add, by conſtruction, "and ſo ſhall continue during the whole voyage." The contract is not ſo. The inſured tell the ſtate of the ſhip and goods *then*, and the inſurers take upon themſelves all future events and riſks, from men of war, enemies, detentions of princes, &c. The parties themſelves could not have changed the nature of the property; but they did not mean to run the riſk of the war. If it made a difference what country the property belonged to, the underwriter ſhould have enquired. The riſk of future war is taken by the underwriter of every policy. By an implied warranty every ſhip muſt be tight, ſtaunch, and ſtrong; but it is ſufficient if ſhe be ſo at the time of her ſailing. She may ceaſe to be ſo in twenty-four hours after her departure, and yet the underwriter will continue liable. The caſe of *Lilly* v. *Ewer* turns quite the other way. The deciſion there was, that the ſhip muſt ſail with convoy, according to the uſage of the trade; that is, convoy deſtined to go as far as uſual in that voyage. The preſent is the cleareſt caſe that can be. The warranty is, that things ſtand ſo at the time; not that they ſhall continue.

Vide ante c 11.

Vide ſupra.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Mr. Juſtice *Buller*.—The caſe of *Lilly* v. *Ewer* is much againſt the defendant, for it was not contended there, that the ſhip muſt *continue* with the convoy during the whole voyage. The *poſtea* was delivered to the plaintiffs.

* And afterwards in a ſubſequent caſe of *Salaucci* v. *Johnſon*, in the courſe of the argument, Mr. Juſtice *Buller* ſaid; I do not agree with the counſel, who contend, that the property muſt continue neutral during the whole voyage: if it be neutral at the time of ſailing, and a war break out the next day, the underwriter is liable.

* P. 353

Vide infra.

And in a ſtill later caſe, which came on for trial before Lord *Kenyon* at *Guildhall*, this point was one amongſt others ſaved for the opinion of the Court of King's Bench. But when the caſe came on to be argued, the counſel for the defendant abandoned the objection upon the authority of *Eden* v. *Parkinſon*; and *Salaucci* v. *Johnſon*: ſo that this point may now be conſidered as for ever cloſed.

Tyſon and Another v. Gurney. B.R. Mich 30. Geo. 3

Having

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Having ſeen what ſhall be deemed a compliance with a warranty, aſſerting that the property inſured is neutral; and having alſo conſidered what effect the breach of ſuch a warranty has upon the contract of inſurance; it may be proper to obſerve, before this chapter is cloſed, how far our courts of law hold the ſentences of foreign courts to be concluſive evidence, that the property was not neutral; ſo as to diſcharge the underwriters.

In the firſt caſe upon this point it was held, that the ſentence of condemnation by a foreign court of Admiralty is not concluſive evidence that the ſhip was not neutral; unleſs it appear that the condemnation went upon that ground: conſequently the underwriter remains liable. A ſentence of a court of Admiralty binds all the world, as to every thing contained within it; but where the cauſe of condemnation does not appear to be on the ſpecific ground material to the point in iſſue, evidence muſt be admitted in order to explain it.

Bernardi v. Motteaux. Doug. 554.

Inſurance of freight and goods was made upon the ſhip the *Jane* (or *Joanna*,) at and from *Venice* to *London*, "*warranted* "*neutral ſhip and neutral property.*" The cauſe was tried before Lord *Mansfield*, at *Guildhall*, when a verdict was found for the plaintiff, ſubject to the opinion of the court, upon a caſe which ſtated as follows: That the defendant underwrote the policy; that the ſhip was taken by a *French* frigate, called *La Magicienne*, as ſhe was ſailing from *Venice* on her voyage to

• P. 354 * *London*; that the plaintiff offered to give evidence on the trial, that the property of the ſhip and the property of the cargo were *neutral*; and that the papers belonging to the ſhip *fell overboard by accident*, after ſhe was brought to by the *French* frigate; but the defendant objected to ſuch evidence being received; and he produced as the ground of his objection, the ſentence of the condemnation of the ſhip in the *French* Admralty Court, which was read and is as follows

"Almeria "The Jo- "anna."

"*Louis Jean Marie de Bourbon, Duke de Penthievre*, Admiral "of *France*. Seen by us, the *procēs verbal*, made on board the "ſnow *Joanna*, taken by the king's frigate *La Magicienne*, "commanded by M. *De Boades*, dated the 2d of *December* laſt. "Signed *Saint Owey*, ſteward, *Bouret Dominico Zanē*. Seen "by the captain commander. Signed *Boades*;—purporting "that the ſaid 2d of *December* laſt, at five o'clock in the even- "ing, his ſaid Majeſty's frigate, *La Magicienne*, commanded "by the ſaid Captain *De Boades*, being ten leagues eaſt of "*Cape de Moulines*, having diſcovered a ſnow ſteering ſouth "ſouth weſt, the wind ſouth weſt, and having come up with "her, and ſtopt her, *under Venetian colours*, after an hour's "chace the ſaid M. *De Boades* ordered the captain to bring "on board his muſter-roll, paſſport, and bills of loading; with "which order the captain did not readily comply under a pre- "tence that the ſea was rough, and that his long boat was "leaky;

leaky; but, being at laſt obliged to comply, upon threats being made of firing on him, and being come on board, he declared, *that, in getting up the ſhip's ſide, the box containing his muſter-roll, his patents, and paſſport had fallen from his pocket into the ſea*, and only ſhewed his bills of loading; by which they found the ſaid ſnow, the *Joanna*, of 14 men, including officers, commanded by *Dominico Zane of Venice, ſailed from Venice the 25th of September, with a cargo of* 12 bales of ſilk, dried raiſins, oil, &c. and other effects mentioned in the bills of loading by him exhibited, for the *account of ſundry perſons in Venice, conſigned to ſundry perſons in London, whither he was bound.* Theſe *goods going into an enemy's country*, and the loſs of his *papers*, which *had fallen into the ſea, raiſing ſuſpicions*; the ſaid ſnow had been ſtopt, and carried by his majeſty's frigate *La Magicienne, to Almeria*, where ſhe had been put into the hands of the counſel, after the * ſaid *Saint Owey*, lieutenant, acting as ſteward, and the ſaid, * P. 355 *Bouret*, enſign on board the ſaid frigate, had put their ſeal on the ſaid ſnow, where they found no papers; and taken on board the ſaid ſhip ten of the ſaid ſnow's crew, which were replaced by ſix men from on board the *Magicienne*, and three from the *Atalante*, with a coaſting pilot, who have brought the ſaid ſnow into the port of *Almeria*. *The premiſes conſidered*, We, by virtue of the power delegated to us as aforeſaid, have declared, and declare, as good prize, the ſhip the *Joanna*, her tackle, and apparel, together with the goods of her cargo, and do adjudge them to the captors; that, in conſequence of this decree, the whole be ſold (if not already done) in the uſual manner, and the produce divided according to the deſire and ordinance of the king: made the 28th of *March* 1778. We order, by theſe preſents, the vice conſul of *France*, at *Almeria*, to look to the execution of this our ordinance; and hereby authorize and command the firſt tipſtaff, or ſerjeant, to proceed in all forms requiſite thereto. "Done at *Paris* the 13th of *January* 1779, *Rigot*." The queſtion ſtated for the opinion of the court was, whether the ſaid ſentence was not concluſive evidence againſt the plaintiff's recovering in this action. In the courſe of the arguments, the third article of the regulations of the marine of *France*, bearing date the 26th of *July* 1778, and alſo the *procès verbal*, made at the time of the capture though not ſtated in the caſe, nor given in evidence at the trial, were ſo much referred to, and ſeemed of ſuch weight to the court, that it will be neceſſary to inſert them in this place. Arret *for the regulation of the marine, &c.* 26th *July* 1778. Art. 3. "All veſſels taken, of what nation ſoever, either neutral or allied, from which it is known that *any papers* have been *thrown* into the ſea, ſuppreſſed or abſtracted, ſhall be declared good prize; together with their cargoes,

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"cargoes, upon the mere proof, that *ſome papers* have been "*thrown* into the ſea. without any neceſſity of examining what "thoſe papers were; by whom they were thrown; and even "though a ſufficient quantity ſhould remain on board to *juſtify* "that the ſhip and the cargo belonged to friends or allies." The *proces verbal* need not be here repeated; for although it is not ſubſtantively ſet out in the caſe, yet it is copied almoſt *verbatim* in the ſentence of the *French* Admiralty. It was ad-

* P. 356 * mitted at the bar, that the ſentence had been appealed from, and had been affirmed; but nothing new or ſpecial appeared in the proceedings on the appeal. This caſe was twice argued at the bar, and after the ſecond argument, the court deſired that it might ſtand over, in order to give time to apply to the defendant for his conſent; that the above *arret* and the *procés verbal* ſhould be added to the caſe. To this propoſition the defendant would not conſent.

Lord *Mansfield*, upon the firſt argument ſaid: The firſt principles are clear and admitted. All the world are parties to a ſentence of a court of Admiralty. Here there is a monition publiſhed at the Exchange; and in other countries, at ſome place of general reſort; and any perſon intereſted may come in and appeal at any time, if there has been no *laches*. If there has, the time of appeal is limited. But the ſentence, as to that which is within it, is concluſive againſt all perſons, unleſs reverſed by the regular court of appeal. It cannot be controverted collaterally, in a civil ſuit. The difficulty here is, what the ground was, on which the *French* Admiralty went; whether the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime laws of all countries, throwing papers overboard is conſidered as a ſtrong preſumption of enemy's property; and upon that principle the *arret* of 1778 is founded. But in all my experience in *England*, I have never known a condemnation on that circumſtance only. It is made uſe of as a ſtrong ground of ſuſpicion. The *arret* is very rigid. It is difficult to find out what the ground of this ſentence was. *I incline* to think the court went upon the ground of *enemy's property*, and conſidered the want of the papers as a ſtrong preſumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and, upon the whole, enough does not appear on this obſcure ſentence, to aſcertain preciſely on what it was founded, and ſome other method ought to be taken to enquire what the ground of it was. As to whatever it *meant* to decide, we muſt take it to be concluſive.

Willes and *Aſhhurſt*, Juſtices, concurred with his Lordſhip.

Mr. Juſtice *Buller* inclined to doubt, and ſaid: To be ſure, the ſentence was obſcure, but, taking it altogether, he did not

* P 357 * think there was much difficulty in diſcovering the grounds of it.

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The two circumſtances, of the cargo being conſigned to the enemy, and the falling of the papers into the ſea, are ſtated as the grounds of ſuſpicion. The latter circumſtance,—papers falling into the ſea,—could not be a ground of condemnation. The other could raiſe no other ſuſpicion, nor a preſumption of any thing elſe, but the property being enemy's property. It follows, therefore, that the condemnation went upon that ground. If it had gone upon a *wilful throwing of papers overboard*, *that* would have been ſtated ſubſtantively, as the ground. In the firſt place, lay the *arret* out of the caſe; and then wilful throwing papers overboard is only preſumptive evidence of enemy's property. Then take the *arret*, ſtill wilful throwing overboard might have been uſed as evidence of enemy's property, or it might have been a ſubſtantive ground under the *arret*: here it is not ſtated as a ſubſtantive ground.

Lord *Mansfield*, after the ſecond argument, ſaid; that if the *proces verbal* ſhould be agreed to be made part of the caſe, it would clearly explain the ambiguity of the ſentence; as it ſet forth the ground for taking the ſhip to have been the *arret* of *July*, 1778. Without the *proces verbal*, he ſaid, the ſentence was equivocal; it took all in; and it was difficult to ſay what it went on. If the papers produced to the captor were fair, the property was neutral. But the *proces verbal* put the ground of the ſentence out of all doubt.

Mr. Juſtice *Buller* alſo declared, that he thought the *proces verbal* muſt be taken as part of the proceedings, and, as that expreſsly referred to the *arret*, as the ground of the capture, and the ſentence was conſiſtent with it, the ſentence muſt be taken to be founded on the *arret*. But he adhered to his former opinion, *on the caſe as ſtated without the proces verbal*, namely, that the interpretation of the ſentence, taken by itſelf, muſt be, that the condemnation went on the ground of enemy's property, and was, therefore, concluſive againſt the plaintiff.

The final refuſal of the defendant was ſignified by Mr. *Lee*, who aſſigned as a reaſon for it, that the *proces verbal* was not a proceeding in the *French* court of Admiralty, but merely an account of what paſſed on the capture, reduced into writing, at the time. He alſo obſerved, that in the ſentence, all the *proces verbal*, *except* the concluding part, which refers to the *arret* of *July* 1778, was recited, and this afforded a ſtrong argument for inferring, that the court had purpoſely omitted that part of it, to ſhew that they did not condemn the ſhip on the ground of the *arret*. * P. 358

Lord *Mansfield* diſapproved much of the defendant's refuſal, but he ſaid, he thought the juſtice of the caſe might ſtill be got at, on the ground of the ambiguity of the ſentence, which did not mention a word about the property *being enemy's property*; that it was clear the *French* Admiralty meant to proceed

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ceed on the ground *of throwing the papers overboard:* and he agreed with the counsel for the plaintiff, that the *procès verbal*, ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it.

Mr. Justice *Buller* thought there was weight in what had been observed by Mr. *Lee*, on the reason for omitting the concluding part of the *procès verbal* in the sentence. Indeed, it was not clear that what was now offered to be produced, was the same *procès verbal*, which the sentence recites; and if it could be supposed, that the captain had made another, omitting the reference to the *arret* as the ground of the capture, *that* could only be accounted for, by his having found that the capture could not be supported on that ground.

Mr. Justice *Willes* thought it most manifest, that the *procès verbal* made at the time of the capture was that, on which the sentence proceeded. The sentence began with mentioning it, and recited it exactly, as to date, and every thing else, as far as it went. The word *purporting* did not require a recital of the whole; and it was not necessary for the Admiralty Court to set forth the captain's reasons for detaining the ship. He had all along been of opinion that the sentence was so ambiguous, that it did not appear that the cause of condemnation was that the property was neutral, and therefore had thought evidence necessary to explain it.

Mr. Justice *Ashhurst* concurred, as to the ambiguity of the sentence, and that it was, therefore, not conclusive; and on that ground, Lord *Mansfield*, and *Willes* and *Ashhurst*, Justices,

*P. 359 * declared their opinion that the *postea* ought to be delivered to the plaintiff. *Lee* still urged the danger of opening the sentences of foreign courts of Admiralty, which are generally informal; upon which, Lord *Mansfield* said, all the supposed inconvenience would be obviated, if the foreign courts would say in their sentences, "*Condemned as enemy's property.*"

In the case just reported, it is admitted by all the judges, that a sentence of a court of Admiralty abroad is binding upon all parties, as to what appears upon the face of it. And therefore if it appear evident, without a possibility of doubt or ambiguity, that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty; and consequently the underwriter is no longer responsible. This was fully settled in the case of *Barzillay* v. *Lewis.*

Barzillay v. Lewis. B.R. Trin. Term, 22. Geo. 3.

It was an action on a policy of insurance on a ship from *Liverpool* to *Amsterdam*, *warranted Dutch property*; and it was brought to recover for a total loss, the ship having been captured by the *French*, and condemned by the court of Admiralty there. The plaintiff (the insured) was nonsuited in this action from an idea, that the decree of the parliament of *Paris* was decisive

deciſive againſt him, that he had not complied with his warranty. Upon a motion to ſet aſide this nonſuit, the following facts appeared from the report of the judge, who tried the cauſe: The ſhip in queſtion was originally a *French* privateer, called *L'Aimable Agathée*, which was taken by an *Engliſh* privateer, and carried into *Liverpool*; where ſhe got the name of *The Three Graces*. A merchant at *Liverpool* afterwards bought her for a houſe at *Amſterdam*, and a paſſport was ſent for her from thence. She was then inſured by a *Dutch* name, and warranted as in the policy; ſhe went to ſea, was captured by a *French* ſhip; and carried into *St. Maloes*, where ſhe was releaſed by the Vice Admiralty Court, as being *Dutch*. But upon an appeal to the parliament of *Paris*, the ſentence was reverſed, and ſhe was condemned as lawful prize, by the name of *The Three Graces of Liverpool*. It appeared in evidence, that there were certain *French* ordinances, which ordain, that where more than one third of the crew of a neutral ſhip are enemies to the king of *France*, the ſhip ſhall be confiſcated: that no ſhip ſhall * be conſidered as transferred, till ſhe has been within the port of the purchaſer: and that a paſſport ſhall be deemed fraudulent, unleſs the ſhip has been in the port, from whence it has been obtained. The ſhip's crew in queſtion conſiſted of ſixteen, five of whom were *French*, four were *Danes*, two were *Swedes*, one was *Dutch*, one *Portugueze*, one *Hamburger*, one *Norwegian*, and one *Iriſhman*. Some of the crew ſwore, that they were hired by *Engliſhmen*, and that both the ſhip and the cargo were *Engliſh*. They alſo ſwore, that when the ſhip which took them came in ſight, the captain ſailed back towards the *Engliſh* coaſt: but one of the crew having informed him, that the ſhip in ſight carried *Engliſh* colours, he reſumed his courſe. * P. 360

Lord *Mansfield*.—The ſentence of the court of Appeal in *France* is concluſive. The queſtion is, what that ſentence means. She is condemned as not being a *Dutch* ſhip. The warranty is, that ſhe is *Dutch*, which is falſe. The law of nations is founded on eternal principles of juſtice; and in every war the belligerent powers make particular regulations for themſelves. But no nation is obliged to be bound by them, unleſs they are agreeable to the general laws of nations; but all third perſons and mercantile people are. In this caſe, the plaintiffs warrant this ſhip to be *Dutch*; and they know they muſt conform to the marine regulations of *France*. The inſurers took the riſk upon this warranty; but her paſs was not agreeable to the treaty. The parliament of *Paris* did not condemn her as the *Dutch* ſhip of *Amſterdam* by her *Dutch* name; but as *The Three Graces of Liverpool*." Indeed ſhe had none of the requiſites of a *Dutch* ſhip; and the regulations require that ſhe ſhould have been into the port of the purchaſer, in order to transfer the property; the knowledge of all which circumſtances

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ſtances the inſured, by his warranty, took upon himſelf. I am therefore of opinion, that the warranty was falſe.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred.

Mr. Juſtice *Buller*.—The ſtrongeſt ground ſeems to be, that ſhe was warranted to be *Dutch* property; and yet had none of the documents neceſſary to protect a neutral ſhip, conſiſtent with the regulations of the court of *France*. The rule to ſet aſide the nonſuit was accordingly diſcharged.

* P. 361

* So alſo in another caſe, where an inſurance was made on the ſhip *Arainha de Portugal*, at and from *Liſbon* to *Bombay*, *warranted a Portugueze ſhip*; the ſhip was captured in *December*, 1782, by the *French*, under the command of Monſ. *de Suffrein*. The ſentence of *Suffrein* was in theſe words: We declare that the ſhip called the *Queen of Portugal*, carrying *Portugueze* colours, was ſeized only in conſequence of the 7th article of the regulations concerning the navigation of neutrals, which ſays, that all ſhips of an enemy's conſtruction, which ſhall not carry a bill of ſale of a date prior to the hoſtilities ſhall not be conſidered as neutral, and ſhall be declared good prize; and the ſaid ſhip having been built at *Bombay* under the name of *Arnable*, and navigated under *Engliſh* colours till 1781, when ſhe took *Portugueze* colours, is abſolutely in the ſituation above mentioned. The ſentence proceeded to declare, that the confiſcation did not proceed on the ground of want of papers, *a verbal procès* having proved, that they were deſtroyed by ſome ſeas ſhipped in the courſe of the voyage; and it alſo ſtated, that there were no contraband goods on board. From this ſentence *De Souza* appealed to the council of prizes at *Paris*; and on the 4th of *January*, 1786, that board after reciting the ſentence of *Suffrein*, proceeds thus: "We, "by virtue of the power given to us by our ſaid office of "Admiral, adopting the declaration of the Bailiff *de Suffrein*, "have declared, and do declare the ſaid ſhip *Queen of Portugal*, "*&c. good prize*; and have, and do confiſcate the ſame for "the benefit of the king." *De Souza* ſtill further appealed to the King in council; and on the 8th of *May*, 1787, the following ſentence was pronounced, after reciting all the former ſentences and other documents in the cauſe: "His ma- "jeſty has ordained, and does ordain, that the ſentence of the "Council of Prizes of 4th *January*, 1786, ſhall be executed, "agreeable to its form and tenor."

De Souza v. Ewer. Sitt. at Guildh. after Hilary 1789.

As ſoon as theſe ſentences were opened, Lord *Kenyon*, Chief Juſtice, was of opinion, that they were concluſive evidence againſt the warranty entered into by the plaintiff. The courts abroad, whoſe ſentences have been mentioned, were competent to the deciſion of the point; and we muſt ſuppoſe that they have done properly, and have acted according to the *jus inter gentes*. This ſhip was condemned becauſe ſhe had

had not those documents to prove her neutrality, which are required by the ordinances of *France*. The courts which condemned this ship proceeded according to the laws of nations, as all courts of Admiralty do: but here it is sufficient, that they had a jurisdiction over the subject matter. * P. 362

The plaintiff was nonsuited; and no application was ever made to set it aside.

See the opinion of Mr. Justice Buller in the preceding case, Acc.

It has also been determined, that where no special ground at all is stated; but the ship is condemned generally as good and lawful prize, the court here must consider it as conclusive evidence that the property was not neutral, and will not again open the proceedings of the court abroad in favour of the party who has warranted his property to be neutral.

Saloucci v. Woodmason E. R. Hill 24 Geo. 3.

An action was brought upon a policy of insurance on goods *warranted neutral* on board the *Thetis, a Tuscan ship*, to recover the amount of the insurance from the underwriters. The ship had been taken in the course of her voyage by a *Spanish* vessel, carried into *Spain*, and her cargo was there condemned "*as good and lawful prize.*" There was an appeal to a superior court, which reversed the sentence: but upon a further appeal the latter decision was overturned, and the former confirmed. At the trial of this cause before Lord *Mansfield*, his lordship being of opinion, that the sentence of the *Spanish* Court of Admiralty was conclusive evidence of the falshood of the plaintiff's warranty, the plaintiff was nonsuited. A motion was made, and fully argued to set aside the nonsuit, which was unanimously refused by the whole court of King's Bench.

Lord *Mansfield*.—The policy here warrants that this cargo was neutral property. It appears from the policy itself, that the ship was neutral; because it is called a *Tuscan* ship; but the warranty is that the goods are neutral. It must be presumed from the condemnation, as no other cause appears, that it proceeded on the ground of the property belonging to an enemy. In the case of *Bernardi* v. *Motteux*, the decision of the court turned upon the particular ground of the confiscation appearing on the face of the sentence; and that it did not appear to be on the ground of being enemy's property. This being so, the court gave the party an opportunity to shew by evidence, that the specifick ground was really the cause of the condemnation. In this case, at *Guildhall*, the counsel admitted the general rule; but they said, if a copy of the proceedings could be had, a special cause would appear. The proceedings are now come; and from them it appears, that the question turned entirely upon the property of the goods. For in the second court, to which they appealed from the sentence of the first, the question was, whether the goods were free: the decree was, that they were. But the third court overturned the decision of the second. It is sufficient,

Vide supra.

* P. 363

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ficient, however, that no ſpecial ground is ſtated; and therefore the rule muſt be diſcharged.

If the ground of deciſion appear to be not on the want of neutrality, but upon a foreign ordinance manifeſtly unjuſt, and contrary to the laws of nations, and the inſured has only infringed ſuch a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty, ſo as to diſcharge the inſurer.

Mayne v. Walter v. B. R. Eaſt. 22 Geo. 3.

In a policy of inſurance, *the ſhip was warranted to be Portuguese*; and having been taken in her voyage by a *French* privateer ſhe was carried into *France*. The Court of Admiralty condemned her becauſe ſhe had an *Engliſh* ſupercargo on board. It appeared that there was a *French* ordinance, prohibiting any *Dutch* ſhip from carrying a ſupercargo belonging to any nation at enmity with the court of *France*. In an action againſt the underwriter, theſe facts appeared; upon which, a verdict was found for the plaintiff, ſubject to the opinion of the Court, upon this queſtion, whether the circumſtance of having an *Engliſh* ſupercargo was a breach of neutrality; and whether ſuch a ſentence was concluſive:

Lord *Mansfield*.— It is an arbitrary and oppreſſive regulation, contrary to the law of nations. If you were both ignorant of it, the underwriter muſt run all riſks; and if the defendant knew of the edict, it was his duty to enquire, if there was ſuch a ſupercargo on board. It muſt be a fraudulent concealment to vitiate a policy. But it is remarkable that neither party has ſaid any thing of the treaties between *France* and *Portugal*. Judgment for the plaintiff.

* P. 364

* One more rule is worthy of obſervation; which is, that though the veſſel be condemned as prize, yet if the grounds of the ſentence appear manifeſtly to contradict ſuch a concluſion the court here will not diſcharge the underwriters, by declaring, that the inſured has forfeited his neutrality.

Salloucci v. Johnſon. B. R. Hill. 25 Geo. 3.

An action was brought upon a policy of inſurance on the ſhip *Thetis*, a *Tuſcan* ſhip, *warranted neutral*. At the trial a verdict was found for the plaintiffs, ſubject to the opinion of the court upon a caſe ſtating, That the plaintiffs were *Tuſcan* ſubjects reſident at *Leghorn*: that the ſhip, having *neutral goods* on board conſigned to *London*, was captured off the coaſt of *Barbary* by a *Spaniſh* veſſel. That ſhe was carried into *Spain*, and there condemned as prize; which ſentence upon appeal to a ſuperior court, was reverſed: but upon a further appeal, the laſt ſentence was reverſed, and the firſt confirmed. That the grounds of condemnation were two; 1ſt. That the ſhip *Thetis* refuſed to be ſearched, and reſiſted with force, having fired at the ſhip of the *Spaniard*: 2d. That the *Thetis* had no charter party on board. The Captain anſwers theſe two grounds thus; 1ſt. That he reſiſted and fired, the *Spaniard* having hailed

hailed him under falſe colours: 2d. That he had taken the goods on board by the piece, and had not freighted her to any individual; in which caſe a manifeſto was ſufficient, without a charter party. The ſentence of the laſt court admits the ſhip to be neutral; for it ſtates it to be "the ſhip *Thetis*, a *Tuſcan* ſhip, *&c.*

Lord *Mansfield* was abſent at the argument of this caſe.

Mr. Juſtice *Willes*.—This is clearly a neutral ſhip Something was ſaid in argument about barratry; but I do not think the act of the Captain in this caſe amounts to that offence. The ſecond ground of condemnation is given up by the counſel; and the remaining queſtion is, whether the Captain has been guilty of ſuch a breach of neutrality, as ſhould affect the owners. If a ſhip be neutral, and ſhe be ſtopped, thoſe, who ſtop her, muſt pay for the detention. But it is ſaid ſhe muſt ſtop to be ſearched. I find no authority for ſuch a poſition. Beſides, the circumſtances are very ſuſpicious. The Captain ſeems to have acted properly. Stoppage is always at the peril of the captors.

* Mr. Juſtice *Aſhurſt*.—I take the principle laid down at the bar to be true, that a ſhip, warranted neutral, muſt conduct herſelf ſo, as not to forfeit her neutrality But the facts of this caſe do not admit of the application. I do not find, that a neutral ſhip muſt admit to be ſearched. It is rather an act of ſuperior force, always reſiſted when the party is able; and the right falls within this poſition, that the ſearcher does it at his peril. If he find any thing contraband, or the property of an enemy, he is juſtified: if not, he pays coſts. Is there any thing to juſtify the ſearch in this caſe? certainly not, for the cargo was neutral. * P. 365

Mr. Juſtice *Buller*.—It is not neceſſary to give an opinion as to barratry; but I take it to mean a wilful act of the captain to the injury of the owners. This would have been barratry, if it had been an act, which forfeits the neutrality. I do not agree that the property muſt continue neutral during the whole voyage. If it be neutral at the time of ſailing, it is ſufficient; and if a war break out next day, the underwriter is liable. The anſwer given to the claim of ſearch is concluſive, that the party does it at his peril; juſt like the caſe of Cuſtom-houſe officers. The practice of the Admiralty confirms it; for they give coſts in caſes of improper detention: which they would not do, if neutral ſhips were, at all events, liable to be ſtopt. Detention by particular ordinances, which do not form a part of the law of nations, is a riſk within the policy. At firſt I compared this caſe in my own mind to that of an illegal voyage; but they are no way ſimilar; for a ſhip is only bound to take notice of the laws of the country ſhe ſails from, and of that to which ſhe ſails: but not the particular ordinances of other powers. Judgment was accordingly given for the plaintiff. Vide ſupra.

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These are the cases which have been decided, relative to the judgments of foreign courts being concluſive, and the effects which they have upon the contract of inſurance; and from all of them it ſhould ſeem, that this general doctrine may be collected: That wherever the ground of the ſentence is manifeſt, and it appears to have proceeded expreſsly upon the point in iſſue between the parties; or wherever the ſentence is general, and no ſpecial ground is ſtated, there it ſhall be concluſive and bind-
* P. 366 * ing, and the court here will not take upon themſelves, in a collateral way, to review the proceedings of a forum, having competent juriſdiction of the ſubject matter. But if the ſentence be ſo ambiguous and doubtful, that it is difficult to ſay on what ground the deciſion turned; or if there be colour to ſuppoſe, that the court abroad proceeded upon matter not relevant to the matter in iſſue; there evidence will be allowed in order to explain. And if the ſentence upon the face of it be manifeſtly againſt law and juſtice, or be contradictory, the inſured ſhall not be deprived of his indemnity; becauſe, to uſe the words of Mr. Juſtice *Buller*, any detention, by particular ordinances or decrees, which contravene or do not form a part of the law of nations, is a riſk within a policy of inſurance.

* P. 367

* CHAPTER THE NINETEENTH.

Of Return of Premium.

HAVING in ſeveral chapters ſpoken fully of the various caſes, in which policies of inſurance are either abſolutely void, or are rendered of no effect by the failure of the inſured in the performance of ſome of thoſe conditions, which he had taken upon himſelf: the next object of our enquiry will be, in what caſes, and under what circumſtances, there ſhall be a return of premium.

In all countries, in which inſurances have been known, it has been a cuſtom, coeval with the contract itſelf, that where property has been inſured to a larger amount than the real value, the inſurer ſhall return the overplus premium: or if it happen that goods are inſured to come in certain ſhips from abroad, but are not in fact ſhipped, the premium ſhall be returned. If the ſhip be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the inſured is not, it ſhould ſeem the latter will be entitled to have his premium reſtored, on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it uſually is) *loſt or not loſt*, I think in that caſe the underwriter ſhould retain; becauſe under ſuch

Loccenius de jure marit. l. 2. c. 5. ſ. 8.

1 Mag. 90.

ſuch a policy, if the ſhip had been loſt, at the time of ſubſcribing, he would have been liable to pay the amount of his ſubſcription. The parties themſelves frequently inſert clauſes in the policy, ſtating that upon the happening of a certain event, there ſhall be a return of premium. Theſe clauſes have a binding operation upon the parties; and the conſtruction of them is a matter for the court, and not for the jury, to determine.—In ſhort, if the ſhip, or property inſured, was never brought within the terms of the written contract, ſo that the inſurer never has run any riſk, the premium muſt be returned.

Dougl. 255.

1 Vezey 319

The principle, upon which the whole of this doctrine depends, is ſimple and plain, admitting of no doubt or ambiguity. The *riſk or peril is the conſideration for which the premium is to be paid: if the riſk be not run, the conſideration of the premium fails; and equity implies a condition, that the inſurer ſhall not receive the price of running a riſk, if, in fact, he runs none. It is juſt like the contract of bargain and ſale; for if the thing ſold be not delivered, the party who agreed to buy, is not liable to pay. Thus to whatever cauſe it be owing, that the riſk is not run, as the money was put into the hands of the inſurer, merely for the riſk of indemnifying the inſured, the purpoſe having failed, he cannot have a right to retain the ſum ſo depoſited for a ſpecial cauſe.

* P. 368

Pothier n. 179.

3 Burr. 1240.

Roccus, Not 88.

Cowp. 668.

Accordingly in an action of *indebitatus aſſumpſit* brought by the plaintiff for 5*l.* received by the defendant to the plaintiff's uſe, where the general iſſue was pleaded; it appeared in evidence, that one *Barkdale* had made a policy of inſurance upon account for 5*l.* premium in the plaintiff's name, and that he had paid the ſaid premium to the defendant, and that *Barkdale* had no goods then on board, and ſo the policy was void To this action two objections were taken: 1ſt. That it ſhould have been brought in *Barkdale*'s name, which was over-ruled. 2dly. That this ought to have been a ſpecial action on the cuſtom of merchants. Lord Chief Juſtice *Holt* cited a caſe of money depoſited upon a wager concerning a race, that the party winning might bring an action of *indebitatus aſſumpſit*, for money received to his uſe; for now by the ſubſequent matter it is become as ſuch. And as to the caſe in queſtion, the money is not only to be returned by the cuſtom, but the policy is made originally void, the party, for whoſe uſe it was made, having no goods on board; ſo that by this diſcovery, the money was received without any reaſon, occaſion, or conſideration, and conſequently it was received originally to the plaintiff's uſe. And ſo judgment was given for the plaintiff

Martin v. Sitwell. 1 Shower, 156.

I cite this caſe for two purpoſes; becauſe it ſerves to ſhew in what form of action the plaintiff ought to demand a return of premium: and it alſo points out, that as early as the beginning of the reign of *William* and *Mary*, the true principle, on which

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the premium ought to be returned, was fully eſtabliſhed. It was ſaid in the introduction to this chapter, that clauſes are frequently inſerted in policies of inſurance, containing con-

* P. 369 * ditions, on the performance or non-performance of which, the premium is returnable; and that to decide upon the conſtruction of ſuch conditions is the province of the court, and not of the jury. Such a caſe occurs, which may properly be mentioned here.

Simond and Another v. Boydell. Doug. 255.

This action was brought againſt an underwriter, for a return of premium. The material part of the policy was in theſe words: "At and from any port or ports in *Grenada* to *London*, "on any ſhip or ſhips that ſhall ſail on or between the firſt of "*May*, and the firſt of *Auguſt* 1778, at 18 guineas *per cent.* to "return 8*l. per cent. if ſhe ſails from any of the Weſt India* "*iſlands, with convoy for the voyage, and arrives.*" At the bottom there was a written declaration that the policy was on ſugars (the muſcavado valued at 20*l.* per hogſhead) for account of *L. Q.* being on the firſt ſugars which ſhall be ſhipped for that account. The ſhip the *Hankey* ſailed with convoy, within the time limited, having on board 51 hogſheads of muſcavado ſugar, belonging to *L. Q.* She arrived ſafe in the *Downs*, where the convoy left her; convoy never coming farther, and indeed ſeldom beyond *Portſmouth*. After ſhe had parted with the convoy, ſhe ſtruck on a bank called the *Pan Sand* at *Margate*, and 11 of the 51 caſks of ſugar were waſhed overboard, and the reſt damaged. The ſhip was afterwards got off the bank, and proceeded up the river, arrived in the port of *London*, and was reported at the cuſtom houſe. The ſugars ſaved were taken out at *Margate*, and, after undergoing a ſort of cure, by a perſon ſent from town for that purpoſe they were carried to *London* in other veſſels; and the 40 hogſheads being ſold, produced 340*l.* inſtead of 800*l.* which was their valuation in the policy. The defendant had paid into court the value of the ſugars loſt, and a return of 8*l. per cent.* on 340*l.* The plaintiffs inſiſted, that they were entitled to have 8*l. per cent.* alſo returned on the *valued* price of the eleven hogſheads of ſugar, which were loſt, and on the difference between what the remaining forty hogſheads produced, and their valued price. At the trial before Lord *Mansfield*, the plaintiffs had a verdict to the full amount of their demand. The chief queſtion, upon the motion for a new trial, was to what the word "*arrives*" was intended to apply.

* P. 370 * Lord *Mansfield*. The ancient form of a policy of inſurance, which is ſtill retained, is, in itſelf, very inaccurate; but length of time, and a variety of diſcuſſions and deciſions, have reduced it to certainty. It is amazing, when additional clauſes are introduced, that the merchants do not take ſome advice in framing them, or beſtow more conſideration upon them themſelves.

I do

I do not recollect an addition made, which has not created doubts on the conſtruction of it. Here a word or two more would have rendered the whole perfectly clear. However, I have no doubt how we muſt conſtrue this policy. Dangers of the ſea are the ſame in time of peace and of war: but war introduces hazards of another ſort, depending on a variety of circumſtances, ſome known, others not, for which an additional premium muſt be paid. Thoſe hazards are diminiſhed by the protection of convoy, and if the inſured will warrant a departure with convoy, there is a diminution of the additional premium. If the inſured will not warrant a departure with convoy, he pays the full premium, and in that caſe the underwriter ſays, "If it "tu n out that the ſhip departs with convoy, I will return part "of the premium." But a ſhip may ſail with convoy, and be ſeparated from it by a ſtorm, or other accident, in a day or two and loſe its protection. On a warranty to ſail with convoy, that would not be a breach of the condition; but, to guard againſt that riſk, the inſured adds, in policies of the preſent ſort, "the ſhip "muſt not only ſail with convoy, but ſhe muſt *arrive*, to entitle "me to the return." The words, *and arrives*, do not mean that the ſhip ſhall arrive in the company of the convoy, but only that ſhe herſelf ſhall arrive. If ſhe does, that ſhews, either that ſhe had convoy the whole way, or did not want it. But, in the ſtipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ſhip. The conſtruction, contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return ſhould be made, unleſs *all* the goods arrived *ſafe*, they would have ſaid, "if the ſhip arrive *with all the goods*," or "*ſafely with all the goods.*" The total or partial loſs of the goods was the ſubject of the indemnity, and muſt be paid for by the underwriter. But, as to the return of the additional premium, whether the goods arrive ſafe or not, makes no part of * the queſtion. The ſingle principle which muſt govern is, that in the events which have happened, the war riſk has been rated too high.

Vide ante, c. 18.

* P. 371

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt*, were of the ſame opinion.

Mr. Juſtice *Buller*.—I am of the ſame opinion. *The queſtion is for the deciſion of the court, not of a jury*, ſince it ariſes on the conſtruction of a written inſtrument. What gives riſe to an increaſe of the premium? The danger of capture. When that danger is diminiſhed, the conſtruction muſt be, that there ſhall be a proportional return of premium. The rule for a new trial was accordingly diſcharged.

By the law of *England*, it has been clearly ſettled, that whether the cauſe of the riſk not being run, is attributable to the *fault, will or pleaſure* of the inſured, ſtill the premium is

Cowp. 668.

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to be returned. Foreign writers have in ſome meaſure differed in opinion upon this point; and it may not be improper to obſerve how far they vary or agree with our own. The *Italian* writers agree with us, that the contract in queſtion is conditional, and that the riſk is the very eſſence and main ſpring of the whole. But ſtill they inſiſt and contend, that it is not lawful for the aſſured, *by their own act*, to break the contract, and that in ſuch a caſe, the inſurer is not obliged to return the premium. They hold indeed, that if the voyage be put an end to by any accident, ſuch as the ſhip being burnt, or by publick authority; or if more goods were *bona fide* inſured, than were actually on board: in the former caſes, the whole; and in the latter, a proportional part of the premium ſhould be returned But if a man ſay he has goods on board, and inſure them, knowing that he has none, they aſk this queſtion: "An aſſecurator teneatur reſtituere pretium, eo "quod in navi non fuerunt merces? Videbatur aſſecurator "teneri ad reſtitutionem pretii recepti: ſed in contrarium eſt "véritas, quod non ſolum non teneatur pretium reſtituere, "imo poſſit patere illud; et ratio eſt, quia licet emptio pe-"riculi non teneat in præjudicium promiſſoris, tamen in "ejus favorem, et in præjudicium aſſecurati falſa aſſertio bene "tenet."

Roccus Not. 15. 82. 88.

Roccus, Not. 11.

Santerna. part 3. n. 22.

* The *French* law-givers have, however, decided upon this point agreeably to our laws; and have accordingly, in the famous ordinances of *Lewis* the Fourteenth, inſerted an article, declaring, that if the voyage is entirely broken up before the departure of the ſhip, *even by the act of the inſured*, the inſurance ſhall be void, and the underwriter ſhall return the premium, reſerving one half *per cent.* for his trouble. This article affords ſcope to *Valin*, the very learned commentator upon theſe ordinances, to point out the advantages which the inſured enjoys above the inſurer, in being thus able to put an end to the contract, even after it is ſigned, which the underwriter can by no means effect. Indeed, when we conſider that the premium is nothing more than the price of the perils, which the underwriters ought to run; and that the obligation to pay the premium contains this tacit condition, "I will pay "*if the inſurers run the riſk*;", it is perfectly conſiſtent with that principle, that when the riſk is not run, whatever be the cauſe, the premium is not due to the inſurers. Accordingly in *England*, it has always been the cuſtom, when the policy is cancelled, to return the premium, deducting one half *per cent.*

* P. 372

2 Emerigon. 153.

Ord. of Lew. 14. tit. Aſſur. art. 37.

2 Val. 93.

Pothier Not. 179.

Molloy, l. 2. c. 7. ſ. 12.

The generality of the rule here eſtabliſhed would ſeem to extend it even to caſes of fraud on the part of the inſured. But the laws of *France*, upon this ſubject, have declared, that the inſured ſhall be obliged to reſtore to the inſurer, whatever he has

Ord. of Lew. 14. tit. Inſur. art. 41.

received

received from him, and alſo to pay him double the premium. This queſtion relative to a return of premium, in caſes of fraud, was very fully diſcuſſed in the chapter of fraud, and all the caſes fully cited; to that chapter therefore I muſt now refer the reader.

Vide ante c. 10. p. 215.

Some of the ſtatutes for preventing the exportation of wool, and other ſtaple commodities of the kingdom, and which, in order more effectually to prevent ſuch exportation, have declared policies of inſurance on thoſe articles to be null and void, have enacted that the premium ſhall not be reſtored to the inſured,

See ante ch. 13. p. 249.

When a policy is void, being made without intereſt, contrary to the ſtatute of the 19 *Geo.* the Second, *if the ſhip has * arrived ſafe*, the court will not allow the inſured to recover back the premium; according to the old rule of law, *in pari delicto potior eſt conditio poſſidentis.* But in the deciſion of the caſe, in which this doctrine was held, the court ſeemed to rely much upon the diſtinction of contracts executed and executory: that this was a contract *executed*, the ſhip having arrived before the demand was made; but when a contract *executory* is to be reſcinded, it can only be done upon the equitable terms of putting all parties in their original ſituation. Mr. Juſtice *Willes* in this caſe differed in opinion from the reſt of the court, for reaſons delivered by the learned judge, and which will appear in their proper place.

19 Geo. 2. c. 37.

Vide ſupra. c. 14. * P. 373

Doug. 454.

The plaintiffs had lent to *Lawſon*, captain of the *Lord Holland Eaſt Indiaman*, 26,000*l.* for which he had given them a common bond, in the penal ſum of 52,000*l.* While he was with his ſhip at *China*, the plaintiffs got a policy of inſurance, underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning "the adventure, *upon the goods* from the loading thereof on "board the ſaid ſhip at *Canton* in *China*, &c. and *upon the ſaid* "*ſhip*, from and immediately following her arrival at *Canton*, "valued at 26,000*l.* being the amount of Captain *Patrick* "*Lawſon's* common bond, payable to the parties as ſhall be "deſcribed on the back of this policy: and it bears date the "16th day of *December* 1775; and in caſe of a loſs, *no other* "*proof of intereſt to be required than the exhibition of the ſaid* "*bond: warranted free from average and without benefit of ſal-*"*vage to the inſurer.*" At the head of the ſubſcriptions was written, "*On a bond as above expreſſed.*" Captain *Lawſon* ſailed from *China*, and arrived ſafe with his privilege (as it is called) or adventure, in *London*, on the firſt of *July*, 1777, none of the events inſured againſt having happened. The receipt of the premium was acknowledged on the back of the policy. The inſured brought this action for a return of the premium, on the ground that the policy being without intereſt,

Lowry and Another v. Bourdieu. Doug. 251.

Vide ante p. 272.

the

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the contract was void. The cauſe came on before Lord *Mansfield*, at *Guildhall*, when his Lordſhip was of opinion, that the policy was a gaming policy, prohibited by the ſtatute of 19 *Geo.* 2. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior eſt conditio poſſidentis*, was applicable to the caſe, and the plaintiffs could not recover the premium. A Verdict was accordingly found for the defendant, agreeably to his Lordſhip's directions; but, the next morning, he expreſſed a doubt as to the propriety of his opinion, becauſe the money had been paid upon an executory agreement, which could never have been compleated. A new trial was then moved for and fully argued.

* P. 374

Lord *Mansfield*.—It is certainly true, in many inſtances, that firſt thoughts are beſt. I am now very much inclined to my firſt opinion. There are two ſorts of policies of inſurance: mercantile and gaming policies. The firſt ſort are contracts of indemnity, and of indemnity only; and from that principle a great variety of deciſions and conſequences have followed. The ſecond ſort may be the ſame in form; but in them there is no contract of indemnity, becauſe there is no intereſt on which a loſs can accrue. They are mere games of hazard; like the caſt of a die. In the preſent caſe, the nature of the inſurance is known to both parties. The plaintiffs ſay, "We mean to game; but we "give our reaſon for it; Captain *Lawſon* owes us a ſum of "money, and we want to be ſecure, in caſe he ſhould not be "in a ſituation to pay us." It was a hedge. But they had no intereſt; for, if the ſhip had been loſt, and the underwriters had paid, ſtill the plaintiffs would have been entitled to recover the amount of the bond from *Lawſon*. This then is a gaming policy, and againſt an act of parliament; and therefore it is clear that the court will not aſſiſt either party: according to the well known rule, that *in pari delicto*, &c. Not that the defendant's right is better than that of the plaintiff, but they muſt draw their remedy from pure fountains. I have returned to my old opinion; ſometimes you miſs the mark, by making too long an aim.

Mr. Juſtice *Willes*.—I ſhall make no apology for differing from the reſt of the court in a caſe where ſuch great abilities have entertained two different opinions. The premium has been paid, and yet no riſk run; for the policy was void from the beginning, and the inſured could not have recovered from the underwriters if the ſhip had been loſt. But I cannot think it a gaming policy. It does not appear to me that the parties had any idea they were entering into an illegal contract. The whole was diſcloſed, and they *thought* there was an intereſt. This was a miſtake; but it is a new point of law. The caſe cited from Precedents in Chancery, is not, perhaps, deciſive, but it goes a great way; and it would be very hard

* P. 375

Vide ante ch. 10 p. 216.

that

that a party ſhould loſe that which he has paid under a mere miſtake. I think, in conſcience, the defendant ought to refund the premium.

Mr. Juſtice *Aſhurſt*.—I am clear that there ought not to be a new trial. A policy of inſurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice; which ſhews deciſively, that this was a gaming policy.

Mr. Juſtice *Buller*.—It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any miſtake in matter of *fact*. If the law was miſtaken, the rule applies, that *ignorantia juris non excuſat*. This was a mere gaming policy, without intereſt. There is a ſound diſtinction between contracts executed and executory, and if an action is brought with a view to reſcind a contract, you muſt do it while the contract continues executory, and then it can only be done on the terms of reſtoring the other party to his original ſituation. There was a caſe of *Walker* v. *Chapman*, ſome years ago in this court, where a ſum of money had been paid in order to procure a place in the *Cuſtoms*. The place had not been procured, and the party who had paid the money, having brought his action to recover it back; it was held that he ſhould recover, becauſe the contract remained executory. So, if the plaintiffs in the preſent caſe had brought their action, before the riſk was over, and the voyage finiſhed, they might have had a ground for their demand; but they waited till the riſk, ſuch as it was, (not indeed founded in law, but reſting on the honour of the defendant) had been completely run. It makes no difference whether the premium was paid before the voyage or after it. The rule was diſcharged.

And very lately it has been held upon the authority of *Lowry* v. *Bourdieu*, as not being diſtinguiſhable from it, that *an action for money had and received will not lie to recover back the premium of a re-aſſurance void by the ſtatute of 19 *Geo.* 2. *ch.* 37. Andree v. Fletcher. 5 Term. R. 266. See ante p. 279.

Lord *Mansfield*, after the rule was diſcharged in *Lowry* v. *Bourdieu*, ſaid, he deſired it might not be underſtood, that the court held, that, in all caſes where money has been paid on an illegal conſideration, it cannot be recovered back. That in caſes of oppreſſion, when paid, for inſtance, to a creditor to induce him to ſign a bankrupt's certificate, or upon an uſurious contract, it may be recovered, for, in ſuch caſes, the parties are not *in pari delicto*. * P. 376

That the court, in the caſe of *Lowry* v. *Bourdieu*, proceeded upon the diſtinction between contracts executed and executory, is evident not only from Mr. Juſtice *Buller's* opinion, but is, in ſome meaſure, confirmed by what fell from Lord *Mansfield*, upon a ſubſequent occaſion, when this caſe was cited; although

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though it must be confessed, that the case about to be quoted, which was only decided suddenly at *nisi prius*, is a good deal shaken by the subsequent decision of *Andree* v. *Fletcher*.

Wharton v. De la Rive. Mich. vac. 1782, at Guildhall.

It was an action brought upon two wagers; one of 26*l.* 5*s.* to 100*l.* the other of 13*l.* 2*s.* 6*d.* to 30*l.* that the colonies of *North America* would be admitted or acknowledged independent states, by some public official act or instrument made or executed, on the part of the king or government of *France*, at some time on or between the 1st of *February* and the 1st of *April*, 1778, both days inclusive. The defendant pleaded *non assumpsit*. Upon the opening of this case, Lord *Mansfield* directed the plaintiff to be nonsuited. But the counsel for the plaintiff insisted, that he was entitled to a verdict for the premium on the general count in the declaration, *for money had and received to his use*, which his Lordship permitted, on the ground of the contract being void, and of the defendant having money in his hands, which he ought not to retain. For the defendant it was said, that he was entitled to keep the premium; and the case of *Lowry* v. *Bourdieu* was cited; but Lord *Mansfield* thought it did not apply, as in that case the risk had been run. The point there decided was, that an insurance being made without interest, and the premium paid,

* P. 377 * the insured shall not recover back the premium, after the ship has arrived safe. And this upon the distinction, that the contract, though not a legal one, *was executed* before the relief was applied for, and no longer *executory*.

From the various cases upon the subject of return of premium, as well as from all that has already been said, it will appear, that in the *English* law there are two general rules established, which govern almost all cases. The first is, that where the

Cowp. 668. risk has not been run, whether that circumstance was owing to the fault, the pleasure or will of the insured, or to any other cause, the premium shall be returned. This rule has already been pretty fully discussed. Another rule is, that if the risk has *once* commenced, there shall be *no* apportionment or return of premium afterwards. Hence in cases of deviation, though the underwriter is discharged from his engagement; yet the risk being once commenced, he is entitled to retain the premium. Though these rules are so plain and simple, that they seem to preclude all possibility of doubt or contention; yet there are few points in the law of insurance, which have given rise to a greater number of causes than those which relate to the subject of this chapter.

It ought, however, to be acknowledged, that less litigation has taken place in those instances where the whole of the premium is either to be retained or restored, than in those, where from the nature of the agreement between the parties, or the nature of the voyage, the contract becomes divisible, and the

court

court can ſay, "a part of the premium ſhall be retained "for the riſk run, and part ſhall be returned as the riſk has "never commenced." This ſeems to be a refinement upon the rules juſt eſtabliſhed; but it muſt, at the ſame time, be admitted, that *when it can be accompliſhed*, it is a refinement perfectly conſiſtent with equity and good conſcience. The one rule has provided, that if the riſk be once begun, there ſhall be no return: but the other rule has ſaid, and equity has alſo ſaid, that a man ſhall not be paid for a riſk which he has never incurred; from whence the deduction is eaſy and natural, that if there are two diſtinct points of time, or, in effect, two voyages either in the contemplation of the parties or by the uſage of trade, and only one of the two voyages was made, the premium ſhall be returned on the other, although both are contained in one policy.

3 Burr. 1240.

* P. 378

The firſt time in which this doctrine was conſidered at any length, was in a caſe which came before the Court of King's Bench in the year 1761.

It was a ſpecial caſe reſerved at a trial at *niſi prius*, before Lord *Mansfield*, in *London*, upon an action for money had and received to the plaintiff's uſe, brought by the plaintiff, the inſured, againſt the defendant the inſurer, for a return of part of the premium. It was an inſurance upon a ſhip, at five guineas *per cent.* loſt or not loſt, *at and from London to Halifax, in* Nova Scotia, *warranted to depart with convoy from Portſmouth*, for the voyage, that is to ſay the *Halifax* or *Louiſburgh* convoy. Before the ſhip arrived at *Portſmouth* the convoy was gone. Notice of this was immediately given by the inſured to the underwriter; and at the ſame time he was alſo deſired either to make the long inſurance, or to return part of the premium. The jury find that the uſual ſettled premium from *London* to *Portſmouth* is one and a half *per cent.* They alſo find that it *is uſual* for the underwriter, in ſuch like caſes, to return part of the premium; but the *quantum* is uncertain: (And the *quantum* muſt in its nature be uncertain becauſe it depends upon uncertain circumſtances.) It is ſtated, that the plaintiff made an offer to the defendant of allowing him to retain one and a half *per cent.* for the riſk he had run on ſuch part of the voyage as was performed under the policy, viz. from *London* to *Portſmouth*.

Stevenſon v. Snow. 3 Burr. 1237. and 1 Black. Rep. 318. S. C.

Lord *Mansfield*.—I had not at the trial, nor have now, the leaſt doubt about this queſtion, myſelf. Theſe contracts are to be taken with great latitude: the ſtrict letter of the contract is not to be ſo much regarded, as the object and intention of it. Equity implies a condition, "that the inſurer ſhall not receive the price of running a riſk, if he run none." This is a contract without any conſideration, as to the voyage from *Portſmouth to Halifax*; for he intended to inſure that part of the voyage, as well

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well as the former part of it, and has not. Conſequently the inſured received no conſideration for this proportion of his premium: and then this caſe is within the general principle of actions for money had and received to the plaintiff's uſe. I do not go upon the uſage: for the uſage found is only that in like * caſes, it is uſual to return a part of the premium, without aſcertaining what part. If the riſk is not run, though it is by the neglect, or even the fault of the party inſuring, yet the inſurer ſhall not retain the premium. It has been objected, that the voyage being *begun*, and part of the riſk being already run, the premium cannot be apportioned. But I can ſee no force in this objection. This is not a contract ſo entire, that there can be no apportionment: for there are two parts in this contract: and the premium may be divided into two diſtinct parts, relative, as it were, to two diſtinct voyages. The practice ſhews, that it has been uſual, in ſuch like caſes, to return a part of the premium, though the *quantum* be not aſcertained. And indeed the *quantum* muſt vary as circumſtances vary: ſo that it never can have been fixed with any preciſe exactneſs. But though the *quantum* has not been aſcertained; yet the principle is agreeable to the general ſenſe of mankind.

* P. 379

Mr. Juſtice *Deniſon*.—It is moſt equitable that the defendant ſhould only retain the premium for ſuch part of the voyage, as he has run any riſk: the inſured has a right to have the other part reſtored to him. This is agreeable to the general principle of actions for money had and received to the uſe of the plaintiff: where the defendant has no right to retain, he muſt refund it.

Mr. Juſtice *Foſter*. There is no conſideration for the remainder of the premium; for in the voyage from *Portſmouth* to *Halifax*, no riſk was run by the inſurer, who only inſured the voyage *with* convoy: therefore he has no right to retain the premium for this.

Mr. Juſtice *Wilmot* declared his concurrence moſt clearly and ſtrongly. Theſe kinds of contracts, he obſerved are, by the writers on this head, called *contractus innominati*; and the rule which they lay down concerning them, is, that they are to be determined *ſecundum bonum et æquum*. The jury have here found an uſage to return part of the premium in ſuch caſes; which is a ſtrong proof of the equity of the thing: and nothing can be more juſt and reaſonable. If the riſk was once begun, the inſured ſhall not deviate or return back, and then ſay, "I "will go no further under this contract, but will have my pre-
* P. 380 * mium returned." But upon this policy there are two diſtinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made; the other not at all entered upon. It was a conditional contract: and the ſecond voyage was not begun; there-

fore

fore the premium must be returned, for upon this second part of the voyage, the risk never took place at all. This is agreeable to what the writers upon the subject lay down; and is the right and justice of the case. The *Postea* was delivered to the plaintiff.

Some years afterwards, the principle established in the foregoing case was attempted to be applied to one, which it did not at all resemble. For the following case was an insurance for twelve months at 9*l. per cent.*; and because the ship was captured within two months after the contract was made, a return of premium was demanded, upon the principle of *Stevenson* v. *Snow*. But the contract in this case was entire; the premium was a gross sum stipulated and paid for twelve months; and the parties, when they made the contract, had no intention or thought of a subsequent division, or apportionment.

The case was thus:

It was an action, in the usual form, for money had and received to the plaintiff's use, for a return of part of the premium. The cause was tried at *Guildhall*, before Lord *Mansfield*, when by consent, a verdict was found for the plaintiff, subject to the opinion of the court upon the question, Whether, under the circumstances of the case, a proportionable part of the premium ought to be returned or not. If the court should be of opinion that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered. It now came before the court upon a rule to shew cause, why a nonsuit should not be entered; and the case, as it appeared from the report, was shortly this. The policy was on the ship *Isabella*, at and from *London*, to any port or place, where or whatsoever, *for twelve months*. from the 19th of *August* 1776, to the 19th of *August* 1777, both days inclusive, at 9*l. per cent.* warranted free from captures and seizures by the *Americans*, and the consequences thereof. In all other respects, it was in the common form, * against all perils of the sea, *&c.* The ship sailed from the port of *London*, and was taken by an *American* privateer, about two months afterwards.

Tyrie v Fletcher. Cowp. 666

* P. 381

Lord *Mansfield*. It was very proper to save this case for the opinion of the court, because in all mercantile transactions, certainty is of much more consequence, than which way the point is decided; and more especially so, in the case of policies of insurance: because, if the parties do not chuse to contract according to the established rule, they are at liberty as between themselves to vary it. This case is stript of every authority. There is no case or practice in point; and therefore, we must argue from the general principles applicable to all policies of insurance. And I take it, there are two general rules established, applicable to this question: the first is, that where the risk has not been run, whether its not having been run was owing

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owing to the fault, pleaſure, or will of the inſured, or to any other cauſe the premium ſhall be returned; becauſe a policy of inſurance is a contract of indemnity. The underwriter receives a premium for running the riſk of indemnifying the inſured, and to whatever cauſe it be owing, if he do not run the riſk, the conſideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the riſk has *once* commenced, there ſhall be no apportionment or return of premium afterwards. For though the premium is eſtimated, and the riſk depends upon the nature and length of the voyage; yet, if it has commenced, though it be only for 24 hours or leſs, the riſk is run; the contract is for the whole entire riſk, and no part of the conſideration ſhall be returned: and yet it is as eaſy to apportion for the length of the voyage, as it is for the time. If a ſhip had been inſured to the *Eaſt Indies* agreeably to the terms of the policy in this caſe, and had been taken 24 hours after the riſk was begun, by an *American* captor, there is not a coulour to ſay, that there ſhould have been a return of premium. So much then is clear; and indeed, perfectly agreeable to the ground of determination in the caſe of *Stevenſon v. Snow*. For in that caſe, the intention of the parties, the nature of the contract, and the conſequences of it, *ſpoke* manifeſtly *two* inſurances, and a *diviſion* between them. The firſt object of the inſurance was from *London* to *Halifax*: but if the ſhip did not depart from *Portſ-*

* P. 382 * *mouth*, with convoy, (particularly naming the ſhip appointed to be convoy) then there was to be no contract from *Portſmouth* to *Halifax*: why then, the parties have ſaid, "we make a contract from *London to Halifax*, but on a certain contingency "it ſhall only be a contract from *London* to *Portſmouth*." That contingency not happening, reduced it in fact to a contract from *London* to *Portſmouth* only. The whole argument turned upon that diſtinction. Mr. *Yates*, who was counſel for the plaintiff, put it ſtrongly upon that head; and all the judges, in delivering their opinions, lay the ſtreſs upon the contract compriſing two diſtinct conditions, and conſidering the voyage as being in fact two voyages; and it was the equitable way of conſidering it; for though it was at firſt conſolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Juſtice *Wilmot* put it particularly upon that ground; but it was the opinion of the whole court. There was an uſage alſo found by the jury in that caſe, that it was cuſtomary to return a proportionable part of the premium in ſuch like caſes but they could not ſay *what* part. The court rejected this as a uſage for *uncertainty*; but they argue from it, that there being ſuch a cuſtom, plainly ſhewed the general ſenſe of merchants, as to the propriety of returning a part of the premium in ſuch caſes; and there can be no doubt of the reaſonableneſs

Vide Supra.

of

of the thing. There has been an inſtance put of a policy where the meaſure is by time, which ſeems to me to be very ſtrong, and appoſite to the preſent caſe; and that is, an inſurance upon a man's life for twelve months. There can be no doubt but the riſk there, is conſtituted by the meaſure of time, and depends entirely upon it; for the underwriter would demand double the premium for *two* years, that he would take to inſure the ſame life for *one* year only: in ſuch policies there is a general exception againſt ſuicide. If the perſon puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breaſt, that part of the premium ſhould be returned. A caſe of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from, provided the ſhip ſhall ſail on or before the 1ſt of *Auguſt*:" and Mr. *Wallace* conſiders in that caſe, that the whole policy would depend upon the ſhip ſailing before the ſtated day. I do not think ſo. On the contrary, I think with Mr. *Dunning*, that cannot be. A loſs in port *before* the day appointed for the ſhip's departure, can never be coupled with a contingency after the day: but if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of the determination of *Stevenſon* v. *Snow*: and that there were two parts or contracts of inſurance with diſtinct conditions. The firſt is, I inſure the ſhip in port, provided ſhe is loſt in port before the 1ſt of *Auguſt*: and 2dly, if ſhe be not loſt in port, I inſure her then during her voyage, from the 1ſt of *Auguſt* till ſhe reaches the port ſpecified in the policy. The loſs in port muſt happen, before the riſk upon the voyage could commence: and *vice verſa*; the riſk in port muſt ceaſe, the moment the riſk upon the voyage begane. Let us ſee then, what the agreement of the parties is in the preſent caſe. They might have inſured from two months to two months, or in any leſs or greater proportion, if they had thought proper ſo to do: but the fact is, that they have made *no diviſion of time at all*; but the contract entered into is one entire contract from the 19th of *Auguſt* 1776, to the 19th of *Auguſt* 1777; which is the ſame as if it had been expreſsly ſaid by the inſured, "If you the underwriter will inſure me for twelve "months, I will give you an *entire* ſum; but I will not have "any apportionment." The ſhip ſails, and the underwriter runs the riſk for *two* months. No part of the premium then ſhall be returned. I cannot ſay, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.

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Mr. Juſtice *Aſton*.—This caſe depends upon the words of the policy: and I am of opinion, it is one entire contract at a certain groſs ſum of 9*l. per cent.* for a certain period of time, *viz.* twelve months; and that no diviſion is to be implied. The

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determination in *Stevenſon* v. *Snow* went expreſsly upon this conſideration, that there were *two diſtinct voyages*, and no conſideration received by the inſured for the premium upon the ſecond voyage: and there certainly was not; for there never was any point of time, when any riſk was run from *Portſmouth*. In *Bond* v. *Nutt*, the loſſes inſured againſt were diſtinct, and unconnected with each other. 1ſt. A loſs of the ſhip in port, if any ſhould happen there. 2dly, A loſs in the paſſage home, provided ſhe ſailed on a certain day. The riſk in ſome policies * may be diſtinct and diviſible in its nature. In the caſe of an inſurance on a life, the ſum is entire, and time is entire for the whole year. So in this caſe, I think the contract is one entire contract; and therefore that there ought to be no return of premium.

Vide ante. c. 28. p. 328.

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Mr. Juſtice *Willes* and Mr. Juſtice *Aſhurſt* were of the ſame opinion.

Per Curiam. Let a nonſuit be entered.

In a ſubſequent caſe, the court of King's-Bench adopted the ſame rule of deciſion, where the ſhip was inſured for 12 months, and the riſk ceaſed at the end of two. A diſtinction was attempted to be made, becauſe in this caſe, the whole premium 18*l*, was acknowledged to be received from the inſured *at the rate of* 15 *ſhillings per month*: and this, it was inſiſted, evidently ſhewed the parties intended the riſk to continue only from month to month. This objection was, however, over-ruled; the court being of opinion, that the caſe laſt reported decided this; and that the 15*s*. per month was only a mode of computing the groſs ſum. The caſe was in ſubſtance as follows:

Loraine v. Thomlinſon. Dougl. 564.

It was an action tried before Lord *Loughborough*, at the laſt aſſizes for the county of *Northumberland*, in which the plaintiff declared,—That the defendant, in conſideration that the plaintiff at his requeſt, had underwritten ſeveral policies of inſurance as to certain ſums of money therein ſubſcribed againſt his name, on the ſhips, merchandizes, and other things therein reſpectively ſpecified, without receiving the full premiums therein mentioned, undertook and promiſed to pay the plaintiff ſo much money, as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to 40*l*. There was another count for 40*l*. for money had and received by the defendant to the plaintiff's uſe. The defendant pleaded non aſſumpſit, as to all except the ſum of 3*l*. upon which plea iſſue was joined; and as to the 3*l*. he pleaded a tender, and paid that ſum into court. Upon the plea of tender, iſſue was alſo joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other iſſue, for the ſum of 15*l*. ſubject to the opinion of the court, whether he was entitled to recover * that ſum of 15*l*. or the ſum of 3*l*. only, upon a caſe, which ſtated, in effect as follows: The plaintiff had underwritten 200*l*. on a policy

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policy effected at *Newcaſtle* (which was ſet forth *verbatim* in the caſe) whereby the ſhip the *Chollerford* was inſured, againſt capture by the enemy for *twelve months*, in the coaſting trade between *Leith* and the *Iſle of Wight*; beginning the 13th of *March*, 1779, and ending the 13th of the ſame month, 1780. In the body of the policy it was ſtated, "That the aſſurers con- "feſſed themſelves paid the conſideration due unto them by the "aſſured, *at and after the rate of* 15*s. per cent. per month.* At "the bottom, oppoſite to the plaintiff's ſubſcription was writ- "ten, premium received 16th of *March*, 1779;" and on the back was indorſed, "*Newcaſtle*, 15th of *March*, 1779, Mr. "*John Gaul Tomlinſon*, on his ſhip the *Chollerford*, himſelf "maſter, *for twelve months*, in the coaſting trade, at and be- "tween *Leith* and the *Iſle of Wight*, beginning the 13th of "*March*, 1779, and ending the 12th of *March*, 1780. Enemy "only. *At* 15*s. per cent. per month*, 18*l.*" The premium was not paid, though expreſſed in the policy to have been paid, it being the uſage in *Newcaſtle* not to pay the premium at the time of making the inſurance; but at various times after the policies are effected, and ſometimes, not till twelve months after. The ſhip was loſt in a ſtorm, within the firſt two of the twelve months for which the inſurance was made, and the defendant tendered to the plaintiff 3*l.* as the premium for two months. The caſe then ſtates contradictory evidence given by witneſſes on both ſides, as to what had been done at *Newcaſtle* in ſimilar caſes; but which I forbear to ſet down; becauſe the court of King's-Bench was afterwards of opinion, that it ought not to have been received.

After the counſel for the defendant had been heard, the plaintiff's counſel was prevented by the court from proceeding.

Lord *Mansfield*.—This is a mere queſtion of conſtruction, on the face of the inſtrument, and therefore parole evidence ſhould not have been admitted to explain it. It is an inſurance for twelve months, for one groſs ſum of 18*l.* They have calculated this ſum to be at the rate of 15*s.* per month. But what was to be paid down? Not 15*s.* for the firſt month, and ſo from month to month; but 18*l.* at once. Two caſes have been * mentioned. *Stevenſon* v. *Snow* was decided on the ground of there *being two voyages*. *Tyrie* v. *Fletcher* is directly in point againſt the defendant. There are two principles in theſe caſes; 1ſt. If the riſk has never begun, the whole premium is to be returned, becauſe there was no conſideration: 2d. When the riſk has begun, there ſhall never be a return, although the ſhip ſhould be taken in 24 hours. * P. 386

Mr. Juſtice *Aſhhurſt*.—The 15*s.* per month is only a mode of computing the groſs ſum.

Mr. Juſtice *Willes*, and Mr. Juſtice *Buller* concurring in opinion, the *poſtea* was delivered to the plaintiff.

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The two laſt caſes were inſurances upon time; but from the principles laid down in them, and in the former caſe of *Stevenſon* v. *Snow*, it ſeems perfectly clear, that when the contract is entire, whether it be for a ſpecified time, *or for a voyage*, there ſhall be no apportionment or return, if the riſk has once commenced. And therefore where the premium is entire in a policy on a voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which, the riſk is to end, nor any uſage eſtabliſhed upon ſuch voyages; although there be ſeveral diſtinct ports, at which the ſhip is to ſtop, yet the voyage is one, and no part of the premium ſhall be recoverable.

Bermon v. Woodbridge. Dougl. 751.

A rule had been obtained to ſhew cauſe why there ſhould not be a new trial in a caſe, which had come on before Lord *Mansfield* at *Guildhall*, when the jury found a verdict for the defendant. The caſe was this: it was an action on a policy of inſurance, on the *French* ſhip *Le Pactole*, and her cargo, and the voyage was deſcribed in the policy in the following words: "At and from *Honfleur to the coaſt of Angola, during her ſtay* "*and trade there, at and from thence to her port or ports of diſ-* "*charge in St. Domingo, and at and from St. Domingo back to* "*Honfleur.*" The clauſe reſpecting the premium was as follows: "Slaves valued at 800 *livres Tournois per* head; the ſhip "at 1450*l.* ſterling; other goods, &c. as intereſt may appear; "*at a premium of* 11 *per cent.*" The ſhip ſailed to *Angola*, and from thence after ſtaying ſome time there, to the *Weſt Indies*. On her way to *Angola*, ſhe put in at *Cayenne*, on the coaſt of *America*, and from *Cayenne* went to *Martinico*, confeſſedly out of the way to *St. Domingo*. In this cauſe, the firſt queſtion was a queſtion of fact, not material to our preſent enquiry, viz. whether the courſe taken was a deviation, or not, from the voyage inſured. After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counſel for the plaintiff inſiſted, that as there was a count in the declaration for money had and received, the voyage inſured ought to be conſidered as compoſed of three diſtinct parts or voyages; namely, from *Honfleur* to *Angola*; 2dly, from *Angola* to *St. Domingo*; and 3dly, from *St. Domingo* to *Honfleur*; and that, as the voyage from *St. Domingo* to *Honfleur* had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to inſure the riſk from *St. Domingo* to *Honfleur*. Lord *Mansfield* took the opinion of the jury upon that point alſo; and they were clear there ought to be no return. Next day, however, his Lordſhip ſaid, he had turned that queſtion in his mind, and that he entertained ſome doubts upon it, and as it was a queſtion of law, deſired Mr. *Lee* to move for a new trial on that ground. It was however, afterwards moved on both grounds; namely on the queſtion of fact, whether the

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the deviation was wilful: and 2dly, On the queſtion of law, whether, ſuppoſing it wilful, there ought to be a return of premium.—Theſe queſtions were fully diſcuſſed by three advocates on each ſide; and the court alſo took time to deliberate upon them: after which the Lord Chief Juſtice delivered the unanimous opinion of the whole court.

Lord *Mansfield*, after ſtating, that upon the queſtion of fact, they were perfectly ſatisfied with the verdict of the jury, proceeded thus: If, however, the plaintiff ſhould ſucceed on the ſecond point, the determination would virtually allow him a new trial on the whole of the cauſe, becauſe no ſpecial caſe was reſerved. But, on the fulleſt conſideration, and after looking into all the caſes, (though my opinion has fluctuated) we are now all clearly of opinion, that there ought not to be any return. The queſtion depends upon this: Whether the policy contains one entire riſk on one voyage, or whether it is to be ſplit into ſix different riſks; for, by ſplitting the words, and taking "at" * and "from" ſeparately, it will make ſix, viz. 1ſt, *At Honfleur*; 2d, *From Honfleur to Angola*; 3d, *At Angola*, &c. The principles are clear. Where the riſk has never begun, there muſt be a return of premium; and, if the voyages, in this caſe, are diſtinct, the riſk from *St. Domingo* to *Honfleur* never began. On the other hand, if the riſk has once begun, you cannot ſever it, and apportion the premium. In an inſurance upon a life, with the common exceptions of ſuicide, and the hands of juſtice, if the party commit ſuicide, or is executed in twenty-four hours, there ſhall be no return. The caſe is the ſame, if a voyage inſured is once begun. Is this one entire riſk? The inſured and inſurers conſider the premium as an entire ſum for the whole, without diviſion: it is eſtimated on the whole at 11*l.* *per cent.* And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy which happening, or not happening, is to put an end to the inſurance. The argument muſt be, that, if the ſhip had been taken between *Honfleur* and *Angola*, there muſt have been a return. By an implied warranty, every ſhip muſt be ſea worthy when ſhe firſt ſails on the voyage inſured, but ſhe need not continue ſo throughout the voyage; ſo that, if this is one entire voyage, if the ſhip was ſea worthy when ſhe left *Honfleur*, the underwriters would have been liable, though ſhe had not been ſo at *Angola*, &c.; but according to the conſtruction contended for on behalf of the plaintiff, ſhe muſt have been ſea worthy, not only at her departure from *Honfleur*, but alſo when ſhe ſailed from *Angola*, and when ſhe ſailed from *St. Domingo*. The caſes of *Stevenſon* v. *Snow* and *Bond* v. *Nutt*, were quite different from this. They depended upon this, that there was a contingency ſpecified in the policy, upon the not happening of which the inſurance would ceaſe. In *Stevenſon* v. *Snow*, it depended

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pended on the contingency of the ſhip ſailing with convoy from *Portſmouth*, whether there ſhould be an inſurance from that place This neceſſarily divided the riſk, and made two voyages. In *Bond* v. *Nutt*, it was held, that there were two riſks, upon the ſame principle. "*At Jamaica*" was one; the other, viz. the riſk "*from Jamaica*," depended on the contingency of the ſhip having ſailed *on or before the 1ſt of Auguſt: that* was a condition precedent to the inſurance on the voyage from *Jamaica* to *London*. The two caſes of *Tyrie* v. *Fletcher*; and *Loraine* v. *Tomlinſon*, are very ſtrong, for, if you could apportion the premium in any caſe, it would be in inſurances upon time. Therefore, on very full conſideration, we think this one entire riſk; one voyage, and that there can be no return of premium. The rule was diſcharged.

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Meyer v. Gregſon. B. R. Eaſt. 24. Geo. 3.

Accordingly in another action for return of premium, tried before Mr. Juſtice *Willes*, on the Northern circuit, where a verdict had been given for the plaintiff, upon a motion to ſet aſide the verdict, and to enter a nonſuit, a deciſion, ſimilar to that of *Bermon* v. *Woodbridge*, was made. The inſurance was "*At and from Jamaica to Liverpool warranted to ſail on or before "the firſt of Auguſt, premium twenty guineas per cent. to return "eight, if ſhe ſailed with convoy.*" The ſhip did not ſail till *September* and was loſt. The jury apportioned the premium, and gave the plaintiff a verdict for eight guineas, the defendant having paid eight for the convoy into court, which was allowing four for the riſk run by the defendant *at Jamaica*.

Lord *Mansfield*.—It would be endleſs to go into enquiries about the riſk at *Jamaica*. It appears on the evidence to be different on different ſides of the iſland. Beſides the parties have divided the riſk, with reſpect to convoy; for it is a premium of twenty guineas, to return eight, if ſhe ſail with convoy: but there is an abſolute warranty as to the ſailing, and nothing ſaid of the premium.

Mr. Juſtice *Willes* thought the premium ſhould be apportioned.

Mr. Juſtice *Aſhhurſt* and Mr. Juſtice *Buller* agreed with Lord *Mansfield*, the latter obſerving, that as the parties have not conſidered it as two riſks, nor eſtimated the riſk at *Jamaica*, the court cannot do it for them. In all the inſurances from *Jamaica*, the policy runs "at and from;" and though in many inſtances the voyage has not begun, yet there never was an idea of the premium being returned, and that no uſage was found by the jury. The rule for entering the judgment of nonſuit was made abſolute.

Vide ſupra.

I am aware that the deciſion in this caſe may ſeem to claſh with what fell from Lord *Mansfield*, in delivering his opinion in the caſe of *Tyrie* v. *Fletcher*; in which he put a ſuppoſed caſe of an inſurance "at and from, *provided* the ſhip ſhall ſail on or before

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before the firſt of *Auguſt.*" In ſuch a caſe, his Lordſhip obſerved, *as then adviſed*, he ſhould incline to think it a diviſible riſk. In this place, it would be ſufficient to obſerve, in anſwer to ſuch an objection, that the opinion then delivered by Lord *Mansfield* was a mere *obiter dictum* upon a point, ariſing only in the courſe of argument: in which caſe, the greateſt abilities are liable to miſtake. But his Lordſhip delivered that opinion, with a wiſe and prudent reſervation, that, *as at preſent adviſed*, he thought ſo and ſo: and it is no diſgrace to any man, however renowned for knowledge, to alter an opinion, upon mature deliberation. There is, however, one very obvious diſtinction, upon which the court relied much, between *Meyer* v. *Gregſon*, and the caſe put in *Tyrie* v. *Fletcher*: for in the latter, the inſured has uſed a moſt ſignificant word (*provided*) to mark the difference between the two parts of the riſk; "*at and from*, "*provided ſhe ſail, &c.*" In the former, the inſured as expreſsly provided for a return of premium, in caſe the ſhip ſails with convoy; why did he not uſe the ſame precaution, leſt ſhe ſhould not ſail by the day limited? Having done it in the one caſe, it is to be preſumed he did not mean to do it, or that the inſurer would not conſent that it ſhould be done, in the other: and as the parties had not divided the riſk themſelves, the court could not do it for them.

In another caſe upon an inſurance "at and from any port or "ports in *Jamaica* to *London*, following and commencing on "her firſt arrival there, warranted to ſail with convoy from the "place of rendezvous to *Great-Britain*," the ſame queſtions were again agitated. But as the counſel differed upon the evidence given at the trial, the main queſtion was not fully diſcuſſed by the court, but was ſent back to a new trial. Gale v. Machell B. R. Eaſt. Term. 25 Geo. 3.

The laſt caſe upon this ſubject was alſo an action for a return of the premium. The policy was "at and from *Jamaica* to *London*, warranted to depart with convoy for the voyage, and to ſail on or before the 1ſt of *Auguſt*, upon goods on board a ſhip called the *Jamaica*, at a premium of 12 guineas *per cent:*" The ſhip ſailed from *Jamaica* to *London* on the 31ſt of *July* 1782, but without any convoy for the voyage. At the trial * before Lord *Mansfield*, the jury found a verdict for the plaintiff, ſubject to the opinion of the court upon a caſe, ſtating the facts already mentioned. In addition to which, they *expreſsly* find, "that it is the conſtant and invariable uſage in an inſurance, "at and from *Jamaica* to *London*, warranted to depart with "convoy, or to ſail on or before the 1ſt of *Auguſt*, when the "ſhip does not depart with convoy, or ſails after the 1ſt of "*Auguſt*, to return the premium, deducting one half *per cent.*" Long v. Allen, B. R. Eaſt. Term. 25 Geo. 3.

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Lord *Mansfield.*—An inſurance being on goods warranted to depart with convoy, the ſhip ſails without convoy; and an action is brought to recover the premium. The law is clear,

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that if the riſk be commenced, there ſhall be no return. Hence queſtions ariſe of diſtinct riſks inſured by one policy or inſtrument. My opinion has been to divide the riſks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has ſometimes leaned againſt them. But where an expreſs uſage is found by the jury, the difficulty is cured. They offered to prove the ſame uſage as to the *Weſt Indies* in general; but I ſtopt them, and confined the evidence to *Jamaica*.

Vide Meyer v. Gregſon.

Mr Juſtice *Willes*, and Mr. Juſtice *Aſhurſt*, concurred with his Lordſhip.

Mr. Juſtice *Buller*.—The counſel for the defendant did right in his argument to make the chief queſtion, Whether parole evidence of this uſage ought to have been received. In mercantile caſes from Lord *Holt's* time, and in policies of inſurance in particular, a great latitude of conſtruction as to uſage has been admitted. By uſage, places come within the policy, which are not expreſſed in words; uſage explains and even controuls the policy. The uſage here found by the jury is univerſal: and though in ſome caſes one half *per cent.* may be a ſmall premium for the riſk *at*; yet the underwriters are aware that it is ſo. In *Meyer* v. *Gregſon*, no uſage was found. Beſides in caſes of this kind, where every thing is left to the whim and caprice of a jury, I lean much againſt them. Here a general and certain uſage is found; and no inconvenience can reſult from it. The *poſtea* was delivered to the plaintiff.

From the tenor of all theſe caſes it ſhould ſeem, as my Lord *Mansfield* ſaid in the caſe of *Long* v. *Allen*, that ſo
* P. 392 * many difficulties occur in apportioning the premium, that the courts are often obliged to decide againſt it, unleſs there be ſome uſage upon the ſubject. Even in the caſe of *Stevenſon* v. *Snow*, the jury found that it had been uſual to divide the riſk; and although the court rejected the uſage for uncertainty, becauſe it did not aſcertain what proportion of the premium ſhould be returned; yet they expreſsly ſay, that it ſerves to ſhew what the idea of the mercantile world is upon the ſubject. If, indeed, we look back to all the caſes reported in this chapter, we never find an apportionment take place, except in *Stevenſon* v. *Snow*, and *Long* v. *Allen*, on account of the difficulty, unleſs there be ſome uſage, as in thoſe caſes, to guide and direct the judgment of the court.

Vide ante c. 18.

Before this chapter is concluded, it will be proper to obſerve, that in the caſe of *Bond* v. *Nutt*, which was ſo often mentioned in the argument of the caſes upon apportionment, the queſtion never aroſe. In that caſe, the two material queſtions were, as may be ſeen by a reference to it in the two preceding chapters of this work, whether the ſhip had complied with a warran-

warranty of ſailing by a particular day: and whether in going to the place of rendezvous for convoy, ſhe was guilty of a wilful deviation. It was proper to mention this, to prevent miſconſtruction; and it was alſo taken notice of by Mr. Juſtice *Buller*, in the caſe of *Long* v. *Allen*. CHAP. XX.

*CHAPTER THE TWENTIETH. *P. 393

Of the Proceedings upon Policies of Inſurance.

IN the preſent Chapter, it is intended to point out in what manner, and by what form of legal proceeding, a man, who has inſured property, and has ſuſtained a loſs, is to recover againſt the underwriters upon the policy. We have formerly ſeen, that the Court of Policies of Inſurance fell into diſuſe, and the reaſons why it did ſo: ſince which period all queſtions of this nature have been decided by the uſual mode of trial, known to the laws and conſtitution of this country, namely, the trial by jury in the courts of common law. Caſes of this nature are not the ſubject of enquiry even in a court of Equity, becauſe the demand is plainly a demand at law; and the loſs and damage ſuſtained are as much the object of proof by witneſſes, as any other ſpecies of damage whatever. This was decided by a decree of Lord Chancellor *King*, whoſe opinion was afterwards confirmed by the Houſe of Lords. Vide the Introduction.

In the year 1720, ſome merchants at *Oſtend* ſet up a trade to the *Eaſt Indies*; and amongſt others, one *James Maelcamp* equipped a ſhip called the *Flandria*, for a voyage to *China*, wherein ſeveral perſons were concerned. *Maelcamp* had the care and direction of the ſhip, and gave receipts to the ſeveral perſons concerned, for the monies they paid, promiſing to be accountable to them for their reſpective proportions of the net profit of the voyage. Theſe tranſactions being carried on moſtly at *Oſtend* or *Antwerp*, the ſeveral perſons, who had a mind to be concerned in the undertaking, gave directions to their correſpondents at thoſe places, to pay *Maelcamp* what ſums they thought fit, and to take his receipts for the ſame. The appellants gave directions to one *Conninck* to pay ſeveral large ſums to *Maelcamp*, on account of the ſaid undertaking; and accordingly *Conninck* paid him divers ſums, amounting to 35,000 guilders, and took diſtinct receipts for the ſame, according to the proportion, for which the appellants were con- De Gheton and Others v. the Governor and Company of the London Aſſurance. 3 Brown's Parliament Caſes 525.

* cerned therein: he alſo, by the order and direction of the appellants, and for their uſe or benefit, agreed with the reſpon- * P. 394

dents

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dents to insure on the said ship the *Flandria*, 5000l. and by a policy, dated the 26th day of *December*, 1720, this insurance was effected, at a premium of 12*l. per cent.* The ship sailed from *Ostend*, in order to proceed to *China*; but on her way, was seized at *Bencoolen*, in the *East Indies*, by the governor, being an *English* settlement, and the ship and cargo were confiscated. The appellants, upon notice of this event, applied to the respondents for payment of the 5000*l.* insured, and produced to them the several receipts for their respective interests in the ship, and affidavits affirming the several sums therein mentioned, to have been really and *bonâ fide* paid. But the respondents refusing to pay, or make any satisfaction to the appellants, *they brought their bill in the Court of Chancery* against the respondents, and the said *Conninck*, praying, *that the respondents might be decreed to pay the appellants the said sum of* 5000*l. with interest*, according to their several and respective shares and proportions thereof. To this bill, the respondents put in a demurrer and answer, and to such part of the bill, as sought to compel them to pay the appellants the 500*l.* or to make them any satisfaction for any loss, which had happened to the ship, they demurred; and for cause of demurrer shewed, that if the policy of insurance in the bill mentioned was forfeited, *a proper action at law lay to recover the money due thereupon*; and that the appellants, if they were entitled to such relief as they prayed by their bill, might have their complete and adequate remedy by an action at law, where such matters were properly cognizable, and where the appellants ought to prove their interest in, and the loss of the ship. The demurrer came on to be argued before Lord Chancellor *King*, when his lordship ordered it to stand over for two months till *Conninck's* answer should come in; and if the appellants did not procure such answer in two months, the demurrer was to be allowed. *Conninck* accordingly put in his answer within two months, and thereby admitted, that he made the assurance in his own name, in trust and for the benefit of the appellants; but said, *he did not care to permit the appellants to bring any action against the respondents in his name*; he being advised, that if any such action should be brought, and they should not prevail therein,

* P. 395 * he would be personally liable to pay all the costs and charges occasioned in consequence thereof. In support of the demurrer it was urged, that the appellants' demand was plainly a demand at law, as they had nothing to prove but their interest, and the loss of the ship, which were facts proper to be tried by a jury. That there was no equity suggested by the bill, but a pretended difficulty to produce witnesses: and that their trustee refused to permit them to bring an action in his name: that the former objection might with equal reason be suggested in almost every case of a policy of insurance; and the latter appeared

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manifeſtly to be thrown into the bill, merely to change the juriſdiction, and it was in a great meaſure falſified by the truſtee's anſwer, for he did not ſay that he ever refuſed, but only that *he did not care to permit his name to be made uſe of*. If bills of this kind were encouraged, it would be eaſy to bring all ſorts of property to be tried in a court of Equity.

Upon theſe reaſons, Lord *King* allowed the demurrer; and upon an appeal to the Houſe of Lords, after hearing counſel upon it, it was ordered and adjudged, that the ſame ſhould be diſmiſſed; and the order complained of, affirmed.

There may, it is true, be caſes, where an application to a court of Equity on the part of the inſured, is ſtrictly proper, and will be entertained. For inſtance, if the truſtee in a policy of inſurance do actually refuſe his name to the *ceſtui que truſt* in an action at law, there may be ſome pretence for going into a court of Equity, as Lord *Hardwicke* has once obſerved. Or, if from a concurrence of circumſtances, the perſon, whoſe teſtimony is requiſite to the deciſion of ſome diſputed facts, reſide abroad, the Court of Chancery will grant a commiſſion to examine thoſe witneſſes. But it is not upon a mere general truſt, or the looſe ſuggeſtions of any of theſe facts, that this extraordinary interpoſition will take place. 1 Atk. 547. 2 Atk. 359.

There are alſo caſes, in which the inſurers may go into equity, to obtain injunctions to ſtay the proceedings againſt them at law: as in the laſt caſe mentioned, where the evidence of perſons abroad is requiſite for their defence; in which ſituation, they ſhall have a commiſſion to examine witneſſes abroad, and an injunction to ſtay proceedings at law in the mean time. Another ground for an application to a court of Equity, is a ſuſpicion of fraud on the part of the inſured, and of which I fear the chapter on fraud produces too many inſtances: in ſuch caſes the court will compel the party charged to make a full diſcloſure upon oath of all the circumſtances that are within his knowledge; and to deliver up all papers and documents, that are at all material to the queſtion. But except in theſe inſtances, all iſſues upon policies of inſurance muſt be tried in the courts of common law. Even if the parties, by a clauſe in the policy, agree that in caſe of a diſpute, it ſhall be referred to arbitration, that will not be a ſufficient bar to an action at law; provided no reference has been in fact made, nor is depending. Chitty v. Selwin and. Martin. 2 Atk. 359. * P. 396 Vide c. 10.

Thus in an action upon a policy of inſurance it appeared, that a clauſe was inſerted, that in caſe of any loſs or diſpute about the policy, it ſhould be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reſerved Kill v. Hollifter. 1 Wilſ. 129.

for

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for the conſideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot ouſt this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff muſt have judgment.

Having thus ſeen in what courts the party injured in the contract of inſurance is to ſeek for redreſs, let us now conſider, by what form of action that redreſs is to be obtained. The act of parliament, by which the two Inſurance Companies were erected, ordered, that they ſhould have a common ſeal, by affixing which, all corporate bodies ratify and confirm their contracts. Hence a policy of inſurance made by the *Royal Exchange* Aſſurance Company, or the *London* Aſſurance Company, is a contract under ſeal; and if the contract is broken, the proceedings againſt theſe Companies muſt be by action of debt or covenant. From this circumſtance a great inconvenience aroſe; for under the plea of the general iſſue to an action of debt or covenant, the true merits of the caſe could ſeldom come in queſtion: but in order to bring them forward, it became neceſſary to plead ſpecially. This was attended with ſuch a heavy expence, ſuch great delays, and frequent applications to Courts of equity for relief, that the legiſlature at laſt interpoſed, and enacted, "that *in all actions of debt* to be ſued or commenced "againſt either of the ſaid corporations, upon any policies of "inſurance under the common ſeal of ſuch corporation, for the "aſſuring of any ſhip or ſhips, goods or merchandizes at ſea, "or going to ſea, it ſhould and might be lawful to and for the "ſaid corporations, in ſuch action or ſuit, to *plead generally*, "*that they owed nothing* to the plaintiff or plaintiffs in ſuch ſuit "or action; and that *in all actions of covenant*, which ſhould "be ſued or commenced againſt either of the ſaid corporations "upon any ſuch policy of aſſurance under the common ſeal of "ſuch corporation for the aſſuring of any ſhip or ſhips, goods "or merchandizes, at ſea or going to ſea, it ſhould and might "be lawful for the ſaid reſpective corporations, in ſuch action "or ſuit, to plead generally, *that they had not broke the covenant*, in ſuch policy contained, or any of them; and if thereupon iſſue ſhould be joined, it ſhould and might be lawful for "the jury, if they ſhould ſee cauſe, upon the trial of ſuch iſſue, "to find a verdict for the plaintiff or plaintiffs in ſuch ſuit or action, "and to give ſo much, or ſuch part only of the ſum demanded if "it be an action of debt, or ſo much in damages, if it be an action "of covenant, as it ſhould appear to them, upon the evidence "given upon ſuch trial, ſuch plaintiff or plaintiffs ought in juſtice

6 Geo. I. c. 18.

* P. 397

11 Geo. I c. 30. ſ. 43.

"tice to have." Thus it ſtands with reſpect to the corporations.

Wherever the contract of inſurance is entered into with a private underwriter, it is done by the inſurer merely ſubſcribing his name to the inſtrument, which is no more than what is called by the lawyers a ſimple contract; the remedy for a breach of which is by an action of *aſſumpſit*, or an action upon the caſe founded upon the *promiſe* and undertaking of the inſurer. There are, however, it is to be obſerved, two kinds of actions of *aſſumpſit*: the one, what is denominated, a general *indebitatus aſſumpſit*, in which the plaintiff ſtates generally that the defendant, *being indebted* to him in ſo much money for goods ſold, &c. or * for money lent to the defendant, or for money had and received to the uſe of the plaintiff, in conſideration thereof, *undertook and promiſed* to pay the amount; the other is called a *ſpecial aſſumpſit*, which muſt always be founded on ſome particular or ſpecial agreement. The former can never be uſed as the means to recover upon a policy of inſurance. The only caſes, in which it can be at all uſed with reſpect to this contract are, where money has been paid by miſtake to the inſured by the inſurer, upon the ſuppoſition of a loſs, when in fact there was none; a rule which holds, whether the money was paid through the fraud or miſtake of the receiver: or where the inſured wiſhes to recover back the premium which he has paid to the inſurer. In theſe caſes, the proper mode is to bring an action of *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe: and therefore in almoſt all actions upon policies of inſurance, it is uſual after the count for the ſpecial *aſſumpſit*, to add one or two general counts; that if the policy ſhould be ſet aſide, and the contract declared void, the inſured may at leaſt be enabled to recover the premium.

3 Blackſt. Com. 157.

* P. 398

1 Salk. 22. Skinner 412.

It being thus evident, that the proper form of action, in order to recover upon a policy of inſurance, is a ſpecial *aſſumpſit*, founded upon the expreſs contract of the perſon who ſigns it; it will follow as an immediate conſequence, that the firſt thing which is neceſſary for the plaintiff to inſert in his declaration, or ſtate of the caſe, will be the policy itſelf, becauſe that is the foundation of the whole. He ſhould alſo ſtate, that it was ſigned by the defendant. The next averment will be, that in conſideration of the premium being paid, the defendant had undertaken to indemnify againſt the loſſes ſpecified in the policy. We ſaw in the firſt chapter of this book, that the premium was the conſideration upon which the whole contract reſted; and that by the cuſtom, the receipt of the premium was acknowledged in the body of the policy. It is then neceſſary for the plaintiff to alledge that goods and merchandizes were laden on board to the amount

Vide ante, c. 1. p. 26.

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amount of the ſum inſured, and that the plaintiff was intereſted therein; or if the inſurance be upon the ſhip, the inſured's intereſt muſt, in the ſame manner, be averred. The next material averment is, that the property inſured was loſt, and by what means that loſs happened; in ſtating which, the plaintiff muſt bring it within one of the perils inſured againſt by the policy: but he muſt always ſtate it according to the truth. Thus he ought to ſhew, that it was by perils of the ſea, by capture, by fire, by detention, by barratry, or any of the other perils mentioned in the policy.

* P. 399

Knight v. Cambridge 2 Lord Raym. 1349 1 Stra. 581.

Where the loſs had been by *barratry*, the breach was thus aſſigned, the proceedings being at that time in *Latin*, *per fraudem et negligentiam magiſtri navis depreſſa et ſubmerſa fuit, et totaliter perdita et amiſſa fuit*; and it was inſiſted, that this was not within the meaning of the word *barratry*, but the breach ſhould have been expreſs, that the ſhip was loſt by the *barratry* of the maſter.

The Court were unanimouſly of opinion, that there was no occaſion to aver the fact in the very words of the policy; but if the fact alledged came within the meaning of the words in the policy, it was ſufficient. Barratry imports fraud, and he that commits fraud, may properly be ſaid to be guilty of a neglect, namely, a breach of duty.

It is true that the practice at preſent, as I have reaſon to believe from precedents which I have ſeen ſettled by the ableſt ſpecial pleaders, is to aver ſuch a loſs to have happened "by the "barratry of the maſter or mariners."

If the plaintiff in his declaration allege, that a total loſs has happened, and lay the damages as for a total loſs, it ſhall be no bar to his recovery, though he can only prove a partial loſs; for in an action for damages merely, a man may always recover *leſs*, but never *more* than the ſum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimouſly over ruled.

Gardiner v. Croſedale. 2 Burr. 904. 1 Black. Rep. 198.

The caſe in which it was ſo determined, came before the court upon a queſtion reverſed by Lord *Mansfield* at *Niſi prius* at *Guildhall* upon an action on the caſe, on a policy of inſurance. The inſurance was made upon one fourth part of the ſhip *Encouragement*, and of its cargo, from *Greenland* to *London*, free

* P. 400

* from average under a certain value, from the ice. The plaintiff *declared upon a total loſs* of the ſhip; the declaration expreſsly ſtated a *total loſs* of it; and the *damages* were laid for a *total loſs*. But the evidence only proved an *average or partial loſs*: it was not attempted to prove a total one; and it was only ſhewn that the ſhip had received *ſome* damage, which little more than 50*l.* would have repaired. The defendant's counſel objected at the trial, "that this evidence did not ſupport the plaintiff's declaration." They alſo repreſented the practice to have been on their

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ſide; namely, that proof of a partial loſs was not ſufficient to maintain a declaration for a total loſs. A verdict was taken for 20*l.* as for an average loſs: but it was agreed on both ſides that the verdict ſhould be ſubject to the opinion of the court, "Whether it was maintainable in point of law." If the court ſhould be of opinion that it was, the verdict was to ſtand; but if the court ſhould be of a contrary opinion, the plaintiff was to have a judgment of nonſuit againſt him.

Lord *Mansfield*.—At the trial it appeared to me, and ſo the jury thought, that the preſent caſe could *not* be conſidered as a *total* loſs. The defendant's counſel objected, as they do now, that the jury could not take a partial loſs into their conſideration, upon an expreſs declaration for a total loſs: and I underſtood from them, that the practice ſupported their objection. Mr. *Norton*, who was counſel for the plaintiff at the trial, then argued to the contrary upon principles; and he alſo cited the caſe of *Walker* v. the *Royal Exchange Aſſurance Company*. But that caſe does not prove much; for that was a total loſs. I was ſatisfied upon the principles, provided the practice did not interfere with them, which I was then told it did. I choſe to put it in ſuch a ſhape, that the opinion of the court might be had without delay or expence. No hardſhip was done to the defendant upon the *quantum* of the damages found: for the plaintiff took a great deal *leſs* than it clearly appeared on the evidence that the loſs amounted to. I cannot hear of any ſuch determination as can ſupport the objection that has been made by the defendant's counſel. Therefore it ſtands ſingly upon principles. And upon principles it is extremely clear, that the plaintiff may, upon this declaration, recover damages for a *partial* loſs. This is an action upon the caſe, which is a liberal action; and a plaintiff * may recover *leſs* than the grounds of his declaration ſupport, though *not more*. This is agreeable to juſtice, and conſiſtent with his demand. Here are two grounds of the plaintiff's declaration; namely, the policy, and the damage to the ſhip. As to its being a total or a partial loſs, that is a queſtion more applicable to the *quantum* of the damages, than to the ground of the action. The ground of the action is the ſame, whether the loſs be partial or total: both are perils within the policy. As to the defendant's not coming prepared to defend a partial loſs: this indeed would be an objection if it were true. But the defendant does in truth come prepared to ſhew, that either no damages had happened at all; or, at leaſt, that damages have not happened to ſuch a degree as the plaintiff has alledged in his declaration; or, that he did not ſign the policy. As to the effects of a judgment by default, the defendant could not have been hurt by a judgment by default. For the plaintiff could not have recovered, even upon a writ of enquiry, any greater damages than he could prove to the jury ſworn to aſſeſs them,

* P. 401

that

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that he had actually ſuffered. If the preſent objection were to prevail, it would introduce the addition of unneceſſary counts in declarations, and an enormous ſwelling of the records of the court. It is more convenient to lay the caſe ſhort, than prolix. There is no proof of any practice contrary to the principles. It was the apprehenſion of ſuch contrary practice, that was the only occaſion of my having any doubt at the trial. I am now fully ſatisfied, that the plaintiff may recover either the *whole* or *leſs* than he has laid; and therefore this verdict ought, in my opinion, to ſtand. In an ejectment for more, the plaintiff may recover leſs: it is every day's practice.

Mr. Juſtice *Deniſon* concurred, and thought it a very plain caſe. It is an action for *damages* for the loſs of the ſhip. Now in an action for damages, the plaintiff is to recover his damages according to his proof, *pro tanto*; but he is not, in an action for damages, obliged to prove all that he has alledged. If it had been an action of covenant for pulling down a houſe, would not the plaintiff be entitled to recover damages for pulling down *half* the houſe, provided he had proved that the defendant did it? This is no variance of the evidence from the declaration; the evidence tends, in a certain degree, to the proof of what is alledged in the declaration; it is not neceſſary to lay two counts in ſuch a declaration as this.

* P. 402

* Mr. Juſtice *Foſter* was of the ſame opinion.

Mr. Juſtice *Wilmot*.—In actions for damages, the plaintiff may recover all, or for any part: the damages are ſeverable, and may be given PRO TANTO. Here damages are laid for a *total* loſs, which is only the meaſure of the damages: and the plaintiff proves a *partial* loſs; which only affects the meaſure of the damages, but is no variance from the allegations contained in the declaration. If this had been a judgment by default, yet the plaintiff could not, even in that caſe, have recovered damages for *any more* loſs than he was able to prove under the writ of enquiry of damages. And as to the defendant's not having ſufficient notice that he ſhould come prepared to defend againſt a partial loſs, I think he had ſufficient notice to come thus prepared: for he ought to come prepared to prove, "that no damage at all happened." If *any* at all happened, he will be liable *pro tanto*, if it be proved.

The *poſtea* was delivered to the plaintiff.

An attempt was alſo once made to nonſuit a plaintiff, becauſe the declaration alledged that he had a ſmaller intereſt than he appeared in proof to have. But this attempt alſo failed.

Page v. Rogers. Sitt. at Guildhall, Hil. Vac. 1785.

It was an action on a policy of inſurance, in which the declaration ſtated, that the plaintiff was poſſeſſed of one third of the ſhip on which the inſurance was made. It was proved that the plaintiff had purchaſed the whole ſhip at one period; and as there was no evidence to ſhew that he had ſince parted with any ſhare

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of it, the counſel for the defendant inſiſted, that the plaintiff had not proved his declaration, which alledged him to have but one third.

Lord *Manſfield* over ruled the objection, ſaying, that this was *primâ facie* ſufficient evidence; for *omne majus continet in ſe minus.* (*a*)

We have ſeen that policies of inſurance are ſeldom effected by the party himſelf really intereſted, but generally by the intervention of a broker employed by the inſured, who tranſacts * the buſineſs with the underwriters as attorney for his principal, from whom he receives his inſtructions, and from which, if he deviate, he is anſwerable to his employer in an action on the caſe; like any other perſon who undertakes any office, employment, truſt, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence and ſkill. It is alſo common for the broker to open the polity in his own name, at the ſame time declaring for whoſe uſe, benefit, or intereſt, the ſame is made; which latter declaration, by a late ſtatute is rendered abſolutely neceſſary. As the policy may be made in the name of the broker, ſo alſo may the action be brought in his name, as was done in the caſe of *Godin* and the *Royal Exchange Aſſurance Company*, and a variety of other caſes.

* P. 403

3 Black. Com. 168.

25 Geo. 3. c. 44. Vide ante c. 1. p. 16. and ſee alſo 28 Geo. 3. c. 56. ante p. 18. 1. Bur. 490.

As this contract depends ſo much upon the pureſt good faith, and the moſt liberal communication of circumſtances relative to each particular caſe; when gaming inſurances, without intereſt were aboliſhed by the legiſlature, in order effectually to anſwer the purpoſe intended, it became neceſſary to order that a diſcloſure of all inſurances, effected on the ſame property, ſhould be made even after an action brought.

Vide ante c. 15.

Thus it was declared, " That in all actions or ſuits brought " or commenced by the aſſured, upon any policy of aſſurance, " the plaintiff in ſuch action, or ſuit, or his attorney or agent, " ſhould, within fifteen days after he or they ſhould be required " ſo to do in writing by the defendant, or his attorney or agent, " declare what ſum or ſums he had aſſured, or cauſed to be " aſſured in the whole, and what ſums he had borrowed at re- " ſpondentia or bottomry, for the voyage in queſtion in ſuch ſuit " or action."

19. Geo. 2. c. 37. ſ. 6.

In addition to this very wiſe proviſion, it having appeared to the legiſlature, that ſome vexatious perſons, notwithſtanding the perfect willingneſs of the inſurers to pay loſſes, to which they were liable, ſtill perſevered in bringing actions, by which the defendants were put to great and heavy charges, and had no means of paying the money into Court; it was therefore en-

(*a*) But if the plaintiff in this caſe had the whole ſhip, it ſeems that he could never bring another action for the other two thirds; becauſe that would be a ſplitting of actions.

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acted, "That it ſhould and might be lawful for any perſon or "perſons, body or bodies corporate, ſued in any action or "actions of debt, covenant, or any other action or actions, on "* any policy or policies of inſurance, *to bring into court any ſum "or ſums of money*; and that if any ſuch plaintiff or plaintiffs "ſhould refuſe to accept ſuch ſum or ſums of money ſo "brought into court as aforeſaid, with coſts to be taxed, in "full diſcharge of ſuch action or actions, and ſhould after-"wards proceed to trial in ſuch action or actions; and the "jury ſhould not aſſeſs damages to ſuch plaintiff or plain-"tiffs, exceeding the ſum or ſums of money ſo brought into "court, ſuch plaintiff or plaintiffs, in every ſuch caſe and "caſes, ſhall pay to ſuch defendant or defendants, in every "ſuch action or actions, coſts to be taxed; any law, cuſtom, "or uſage to the contrary notwithſtanding."

* P. 404

19 Geo. 2, c. 37. ſ. 7.

Theſe preliminary ſteps being taken, the defendant is to put in his plea to the charge or declaration of the plaintiff; which by the act of parliament, is preſcribed to the Aſſurance Companies, when they are defendants; namely, that they owe nothing, if the action be debt: or if it be covenant, that they have not broken the covenants, which they had undertaken to keep. But in the caſe of a private inſurer, as the action is merely an *aſſumpſit*; ſo the anſwer to it is, *non aſſumpſit*; that is, the defendant has not promiſed as the plaintiff has alledged. Under this plea, the defendant will have a right to take advantage of all thoſe circumſtances, which as we have ſeen, will either render the policy void, or make it of no effect: ſuch as, fraud, want of intereſt, not being ſea worthy, deviation, non-performance of warranties, and all other grounds ſtated in former chapters.

Vide ſupra

Iſſue being thus joined between the parties, the next object for our conſideration is the proof, which it will be neceſſary for the plaintiff to produce, in order to ſupport his caſe. This enquiry will be rendered very eaſy, by reflecting upon thoſe allegations, which, as we have before ſhewn, it is incumbent upon the plaintiff to inſert in his declaration. We have ſeen, that the policy muſt be ſet out in the declaration; and conſequently the firſt evidence to be given is, that the defendant's hand writing is ſubſcribed to the policy. This, in the liberality of modern practice, is ſeldom required to be done; as the ſubſcription is uſually admitted; but in ſtrictneſs, it may be * inſiſted on: and in a work of this nature, it is my buſineſs to point out every thing, which either party is expected, or compellable to perform. When the ſignature is once proved, the court and jury are in poſſeſſion of the extent of the contract, (except as it may be further extended by *uſage*) the conditions to be performed on either ſide; and all the other circumſtances relative to the riſk inſured. And although in the courſe of our

* P. 405

Vide ante, c. 2.

our enquiries, we have ſeen frequent inſtances, where the uſage and practice of a particular trade controul and extend the written words of a policy; yet in no caſe ſhall evidence of any agreement be allowed, which directly tends to contradict the policy: for to ſuffer them to be defeated by agreements by parole, not appearing, would be greatly to diminiſh their credit, and to render them of no value.

Thus in an action upon a policy of inſurance "*from Archangel to Leghorn*," the defendant ſaid, that the agreement before the ſubſcription was, that the adventure ſhould begin, *but from the Downs*; but this agreement was not put into writing. Lord Chief Juſtice *Pemberton* ſaid, that policies were ſacred things; and that a merchant ſhould no more be allowed to go from what he had ſubſcribed in them, than he that ſubſcribes a bill of exchange, payable at ſuch a day, ſhall be allowed to go from it, and ſay, it was agreed to be on a condition, when it may be that the bill had been negotiated: for though neither of them are ſpecialties, yet they are of great credit, and much for the ſupport, conveniency, and advantage of trade. The jury, notwithſtanding this direction, found for the defendant: but afterwards there was a trial at bar, and a verdict was given for the plaintiff, according to the opinion of the court. Kaines v. Knightly. Skinner 54.

The policy not only proves the extent and nature of the contract; but it alſo eſtabliſhes another allegation in the plaintiff's declaration, namely, *that the premium was paid:* for it was formerly ſhewn, that every policy contains the following clauſe: "*confeſſing ourſelves paid the conſideration due unto us for this aſſurance by the aſſured, at and after the rate of per cent.*" Vide c. 1

* The plaintiff having averred in his declaration, that he is *intereſted* to the amount of the property inſured, it is abſolutely neceſſary that this allegation ſhould be proved. This he muſt do by a production of all the uſual documents, ſuch as, *the bills of ſale*, bills of parcels, and the coſts of the outfit; *the bills of lading* (*a*), ſigned by the maſter, ſpecifying the goods received on board, and for whom he is to carry them, cuſtom-houſe clearances, and every other paper, which may be thought neceſſary to ſubſtantiate his right to the property. * P. 406

(*a*) The firſt great cauſe, in which the law relative to bills of lading came much under diſcuſſion, was in a very modern caſe of *Caldwell* and others v. *Ball*, reported very much at length, and with great accuracy in the 1ſt Term Reports, page 205, for *Eaſter* Term 26 *Geo.* 3. That caſe was fully argued at the bar, and very much debated on the bench. Amongſt other things the court held, that a bill of lading is an acknowledgment under the hand of the captain, that he has received ſuch goods,

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(a) A man having purchaſed goods beyond ſea, in order to prove his property in the cargo, in an action upon a policy of inſurance, produced a *bill of parcels* of one *Gardiner* at *Peterſburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence againſt the inſurers; but the Lord (b) Chief Juſtice allowed it.

(a) Ruſſel v. Boheme. 2 Strange 1127.

(b) Sir Wm. Lee.

(c) Before the ſubject of intereſt is entirely cloſed, I will take the opportunity of mentioning, what I omitted in a former chapter, that if a merchant abroad, who is intereſted in goods and the freight of a cargo, mortgage them to his creditor here for payment of money at a certain day, and by a letter, incloſing the bills of lading, direct an inſurance, the mortgagor has ſtill an inſurable intereſt, although the mortgage was become abſolute, before the letter directing the inſurance was received: * and therefore an action was held to lie againſt the agent for not inſuring agreeably to the inſtructions contained in ſuch letter.

(c) Smith v. Laſcelles. 2 Term R. 187.

* P. 407

It is, in the laſt place, incumbent on the plaintiff to prove that a loſs has happened, and that, by the very means, ſtated in the declaration. It is abſolutely neceſſary, that this rule ſhould be ſtrictly adhered to; for otherwiſe the inſurers would come into court prepared to defend themſelves againſt one charge, and one ſpecies of loſs; and they would then be obliged to reſiſt a demand upon a quite different ground. This appeared clearly in a modern caſe.

Kulen Kemp v. Vigne. 1 Term R. 304.

It was an action on a policy of inſurance, which came on to be tried before Mr. Juſtice *Buller*, who nonſuited the plaintiff. Upon a motion to ſet aſide that nonſuit, the following report was made by the learned judge. The inſurance was *upon goods* on board the ſhip *Emanuel*, at and from *Falmouth* to *Marſeilles*, warranted a *Daniſh* ſhip; and on the policy was this memorandum: "The following inſurance is declared to be on money "expended for reclaiming the ſhip and cargo valued at the ſum, "which ſhall be declared hereafter. The loſs to be paid, *in*

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goods, which he undertakes to deliver to the perſon named in the bill of lading: that it is aſſignable in its nature; and by indorſement the property is veſted in the aſſignee. That where ſeveral bills of lading of the ſame date, but of different imports have been ſigned, no reference is to be had to time, when they were firſt ſigned by the captain: but the perſon, who firſt gets one of them by a legal title from the owner or ſhipper, has a right to the conſignment. And where ſuch bills of lading, though different upon the face of them, are conſtructively the ſame, and the captain has acted *bonâ fide*, a delivery according to ſuch legal title will diſcharge him from them all. But if the intention of the parties appears to have been to bind the net proceeds only, in caſe of the arrival of the goods, an inſurance made on account of the indorſer, after ſuch indorſement, is good.

Hibbert v. Carter. 1 Term Rep. 745.

"caſe

" *caſe the ſhip does not arrive at Marſeilles*, and without further " proof of intereſt than this policy; warranted free from all " average, and without the benefit of ſalvage." It appeared that the plaintiffs were proprietors of the *cargo*, but not of the *ſhip*. That the ſhip originally ſailed with the cargo on board from *Riga* to *Marſeilles*, and that an inſurance had been effected at *Bremen* upon the cargo for that voyage; in the courſe of which ſhe was taken, and brought into *Falmouth*, by an *Engliſh* privateer. That a ſentence of condemnation had been there obtained, which was afterwards reverſed upon the prize having been proved to be a neutral ſhip, but the expences of procuring that reverſal were ordered by the Admiralty Court to be *a charge upon the cargo*. The plaintiff's agents accordingly paid the ſum of 1031*l.* 14*s.* for the expences of reclaiming the ſhip and cargo; and immediately procured the policy in queſtion to be effected in *January* 1781, according to the purport of the memorandum. It the *February* following, the ſhip ſet ſail from *Falmouth* with the original cargo on board, in the proſe- * P. 408
* cution of her voyage to *Marſeilles*: but on the 26th of the ſame month, *before her arrival there*, was capture by a *Spaniſh* ſhip and carried into *Ceuta* in *Spain*, where ſhe was again condemned. An appeal was brought in the ſuperior court of *Madrid*, which promiſing to be of long continuance, the cargo, which was of a periſhable nature, was ordered to be ſold, and the proceeds to be brought into court, to wait the event of the ſuit. In *May* 1783, the veſſel was reſtored by ſentence of the court, and the ſurplus of the proceeds, which aroſe from the ſale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in proſecuting the appeal. After all the charges paid, there only remained twenty ſix rix dollars. As ſoon as the ſhip was liberated, ſhe ſailed from *Ceuta* to *Malaga*, in order to refit, and having there made the neceſſary repairs, ſet ſail for *Bremen*, and in that voyage was loſt. The inſurance made upon the cargo at *Bremen* has been paid. The declaration averred, that " *whilſt the ſhip was proceeding in her ſaid voyage from Falmouth* " *to Marſeilles, and before ſhe could arrive at Marſeilles, ſhe was* " *captured by the Spaniards, and thereby the ſaid ſhip, and alſo* " *the goods and merchandizes on board her, were totally loſt to the* " *plaintiffs.*" At the trial, it was objected on the part of the defendant, 1ſt, That this was not an inſurable intereſt; and 2dly, That the plaintiffs could not recover upon the policy in this form of declaring, for they ſtated the loſs to have happened *by capture*; whereas, though the veſſel was captured, yet, having been afterwards reſtored, ſhe might have reached her deſtined port, notwithſtanding the capture, in which caſe the underwriters would have been diſcarged by the terms of the memorandum. I was of that opinion, and upon the laſt ground, I nonſuited the plaintiffs.

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This caſe was very fully argued both upon the merits, and the formal objection, after which all the Judges ſpoke upon the queſtion

Lord *Mansfield*—A loſs accrued upon the cargo in the voyage: the underwriter is ſued and the loſs is averred in the declaration to be *by capture*. The fact of the caſe is, that the ſhip was taken by a *Spaniſh* privateer, but was afterwards reſtored, and in a condition to purſue the voyage, and was afterwards loſt in another voyage.

* P. 409

* Mr. Juſtice *Willes*.—Upon this caſe, it is clear, that the plaintiffs cannot recover. In the firſt place, there was certainly a deviation, for the ſhip ſet ſail for *Malaga* inſtead of proceeding to *Marſeilles*: Secondly, the plaintiff has declared for a loſs *by capture:* but, after the capture, the policy might ſtill have been complied with by the ſhip's going to *Marſeilles*; and therefore the loſs cannot be ſaid to have happened by that circumſtance.

Mr. Juſtice *Aſhhurſt* and Mr. Juſtice *Buller* alſo delivered their opinions, agreeing with Lord *Mansfield* and Mr. Juſtice *Willes* upon the formal objection; and both went much at large into the merits, upon which I forbear to follow them or the Chief Juſtice, as what paſſed upon that ſubject is not material to our preſent enquiry.

But where a loſs is averred to be by perils of the ſea, and ſome of the goods inſured are ſpoiled, and others ſaved, it is allowable to give the expence of the ſalvage in evidence upon ſuch an averment, becauſe it is a conſequence of the accident laid in the declaration.

Cary v. King. Caſ. Temp. Hardwicke, B. R. 3-4.

In an action on a policy of inſurance, for inſuring goods on board the ſhip *A.* the plaintiff declares that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. The evidence was, that many of the goods were ſpoiled, but ſome were ſaved; and the queſtion was, Whether the plaintiff might give in evidence the expence of ſalvage, that not being particularly laid as a breach of the policy in the declaration.

Lord *Hardwicke* Chief Juſt.—I think they may give it in evidence; for the inſurance is againſt all accidents. The accident laid in this declaration is that the ſhip ſunk in the river; it goes on and ſays, that by reaſon thereof the goods were ſpoiled, that is the only ſpecial damage laid: yet it is but the common caſe of a declaration that lays ſpecial damage, where the plaintiff may give evidence of any damage that is within his cauſe of action as laid. And though it was objected, that ſuch a breach of the policy ſhould be laid, as the inſurer may have notice to defend it; it is ſo in this caſe, for they have laid the accident, which is ſufficient notice, becauſe it muſt neceſſarily follow, that ſome damage did happen.

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CHAPTER THE TWENTY-FIRST. *P. 410

Of Bottomry and Reſpondentia.

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THE contract of bottomry is in the nature of a mortgage of a ſhip, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ſhip, as a ſecurity for the repayment: and it is underſtood, that if the ſhip be loſt, the lender alſo loſes his whole money; but if it return in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt ſtipulated to be paid, however it may exceed the uſual, or legal rate of intereſt. When the ſhip and tackle are brought home, they are liable, as well as the perſon of the borrower, for the money lent.—But when the loan is not made upon the veſſel, but upon the goods and merchandizes laden thereon, which from their nature, muſt be ſold or exchanged in the courſe of the voyage, then the borrower only is *perſonally* bound to anſwer the contract; who therefore in this caſe is ſaid to take up money at *reſpondentia*. In this conſiſts the difference between *bottomry* and *reſpondentia*; that the one is a loan upon the ſhip, the other upon the goods: in the former the ſhip and tackle are liable, as well as the perſon of the borrower; in the latter, for the moſt part, recourſe muſt be had to the *perſon* only of the borrower. Another obſervation is, that in a loan upon bottomry, the lender runs no riſk though the goods ſhould be loſt; and upon reſpondentia, the lender muſt be paid his principal and intereſt, though the ſhip periſh, provided the goods are ſafe. But in all other reſpects, the contract of bottomry and that of reſpondentia are upon the ſame footing; the rules and deciſions applicable to one, are applicable to both; and therefore in the courſe of our enquiries, they ſhall be treated as one and the ſame thing, it being ſufficient to have once marked the diſtinction between them.

2 Blackſ. Comm. 457.

2 Blackſ. Comm. 458.

2 Valin Com. p. 4.

* P. 411

* Theſe terms are alſo applied to another ſpecies of contract, which does not exactly fall within the deſcription of either; namely, to a contract for the repayment of money, not upon the ſhip and goods only, but upon the mere hazard of the voyage itſelf: as if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary intereſt, in caſe a ſpecific voyage named in the condition ſhall be ſafely performed: which agreement is ſometimes called *fœnus nauticum* or *uſura maritima*. But as this ſpecies of bottomry opened a door to gaming and uſurious

2 Blackſ. Comm. 458. 1 Sidersfin 27.

Molloy, lib. 2. c. 11. ſ. 8.

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contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagering policies, introduced a clause, by which it was enacted, "that all sums of money
19 Geo. 2. c. 37. s. 5. "lent on bottomry, or at respondentia upon any ship or ships "belonging to his Majesty's subjects, *bound to or from the East "Indies*, should be lent only on the ship, or on the merchan- "dize or effects, laden or to be laden, on board of such ship, "and should be so expressed in the condition of the said bond; "and the benefit of salvage should be allowed to the lender, "his agents or assigns, who alone should have a right to make "assurance on the money so lent, and in case it should appear "that the value of his share in the ship or in the merchandizes "or effects laden on board of such ship, did not amount to the "full sum or sums he had borrowed as aforesaid, such borrower "should be responsible to the lender for so much of the money "borrowed, as he had not laid out on the ship or merchandizes "laden thereon, with lawful interest for the same, in the pro- "portion the money not laid out should bear to the whole "money lent, notwithstanding the ship and merchandizes "should be totally lost."

This statute has entirely put an end to that species of contract which was last mentioned, namely, a loan upon the mere voyage itself, as far, at least, as relates to *India* voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the Common Law, except in the following instance, which is
7 Geo. 1. c. 21. s. 2. another statute prohibition. The statute alluded to declares, that all contracts made or entered into by any of his Majesty's subjects, or any persons in trust for them, for or upon the loan of any monies by way of bottomry, on any ship or ships
* P. 412 * in the service of foreigners, and bound or designed to trade in the *East Indies or parts aforesaid*, shall be null and void.

This act, it should seem, does not mean to prevent the king's subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the *East Indies*. The purpose of the statute was only to prevent the people of this country from trading to the *British* settlements in *India* under foreign commissions, and to encourage the lawful trade thereto.

It lately became a question in the Court of Common Pleas, whether an *American* ship since the declaration of *American* independency, was *a foreign* ship, within the statute of the
Sumner v. Green. 3. Mich. 30. Geo. 3. in C. P. 7 *Geo.* 1. *ch.* 21. *s* 2. It came before the court, upon a motion to discharge the defendant out of custody upon entering a common appearance. The defendant was held to bail upon a respondentia bond, which was executed by the defendant, who was an *American*, to secure the payment of a cargo shipped by the plaintiff on boare an *American* ship in the *East Indies*

Indies, homeward bound from *Calcutta* to *Rhode-Island* in *America*. The ship had sailed from *England*, and landed a cargo of *European* goods in *Bengal*, previous to her taking in the cargo, on which the bond was given.

The court were much inclined to think the bond was void, the case being within the mischief designed to be remedied by the act. But as the question was of considerable consequence, they thought it not proper to be discussed on this summary application: but they ordered the defendant to be discharged on the ground, that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in prison: more particularly as the plaintiff would by such means have an opportunity of tampering with the defendant in prison, and of escaping from the penalties of the act, by preventing the case from being brought before the court.

A loan upon the voyage, without security on the ship or goods, is entirely prohibited by the laws of *France*; for in the marine * ordinances of that country, there is a *general* regulation similar to that made here with respect to *India* ships: "Faisons de- "fenses de prendre deniers a la grosse sur le corps et quille du "navire, ou sur les merchandises de son chargement, *au delà* "*de leur valeur*, au peine d'etre contraint, *en cas de fraude*, "au paiement des sommes entieres, non obstant la perte ou "prise du vasseau." And in another place it is said, that where a greater sum is borrowed, than the ship or goods are worth, where there is no fraud, the contract is void, except as to the amount of the real value of the ship or goods. If then the contract be only binding as far as there is property to answer the loan, it follows that by the laws of *France*, this contract cannot exist upon the hazard of the voyage merely, unless there be a security also upon the ship or goods.

* P. 413

Ord. of Lew. 14. tit. des Contrats a grosse Avant. art. 3. Loc. cit. art. 15.

The contract of bottomry and respondentia seems to deduce its origin from the custom of permitting the master of a ship, when in a foreign country, to hypothecate the ship in order to raise money to refit. Such a permission is absolutely necessary, and is impliedly given him in the very act of constituting him master, not indeed by the Common Law, but by the Marine Law, which in this respect is reasonable; for if a ship happen to be at sea, and spring a leak, or the voyage is likely to be defeated for want of necessaries, it is better that the master should have it in his power to pledge the ship and goods (*a*) or either of them, than that the ship should be

2 Blackst. Com. 457.

Parnard v. Bridgeman, Moor 918. fully reported in Hobart, p. 11.

(*a*) That the master may hypothecate the goods, as well as the ship, see Salk. 34. pl. 7.

lost

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loſt, or the voyage defeated. But he cannot do either for any debt of his own; but merely in caſes of neceſſity, and for completing the voyage. Although the maſter of the veſſel has this power while abroad, becauſe it is abſolutely neceſſary for purpoſes of commerce and navigation; yet the very ſame authority which gave that power in thoſe caſes, has denied it when he happens to be in the ſame place where the owners reſide. Thus the laws of *Oleron*, in the place above cited, ſpeak of the captain being in a foreign country, and firſt writing home to his owners for money, before he takes money on bottomry: and the laws of the *Hanſe Towns*, which were founded on * thoſe of *Oleron*, ſpeak the ſame language; for they ſay, "a maſter being in *a ſtrange country*, if neceſſity drive him "to it, may take up money on bottomry, if he cannot get "it without, and the owners ſhall bear the charge." In addition to this, all the caſes, which have been determined at the Common Law, upon the ſubject, ſeem to require that the ſhip ſhould be abroad, as well as in a ſtate of neceſſity, to juſtify the captain or maſter, in taking money on bottomry. *Molloy* in expreſs terms declares, that a maſter has no power to take up money on bottomry, in places where his owners dwell; otherwiſe he and his eſtate muſt be liable thereto.—If, indeed, the owners do not agree in ſending the ſhip to ſea, the majority ſhall carry it, and then money may be taken up by the maſter on bottomry for their proportion who refuſe, although they reſide upon the ſpot, and it ſhall bind them all. The two laſt rules are the ſame with the marine ordinances of *France* upon that point: for they alſo declare, that thoſe who lend money to the maſter, in the place where the owners reſide, without their conſent, ſhall have no ſecurity or hypothecation, but on ſuch part of the ſhip only as belongs to the maſter himſelf, even though the money was advanced for repairs, or for purchaſing proviſions. But that the ſhares of thoſe owners, who refuſe to ſend out the ſhip, ſhall be affected by the loan of money to the maſter for neceſſaries. The juſtice and propriety of ſuch a regulation, are evident from conſidering that ſuch a contract was only intended for the benefit of all parties in thoſe places, where the owners had neither a reſidence, nor any correſpondents.

Molloy. b. 2, c. 2. ſ. 14. Leg. Oler. art. 1. & 22.

Lawes of the Hanſe Towns, art. 60.

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Hebart 11. Noy 93.

Molloy, l. 2 c. 11. ſ. 11.

Molloy, loc. cit.

Ord. of Lou. 14. tit. Av. a la groſſe. art. 8. & 9.

2 Valin. Com. 10.

The contract of which we treat is of a different nature from almoſt all others: but that, which it moſt nearly reſembles, is the contract of inſurance: for the lender on bottomry or at reſpondentia, runs almoſt all the ſame riſks, with reſpect to the property, on which the loan is made, that the inſurer does with reſpect to the effects inſured. There are, however, ſome conſiderable diſtinctions; for inſtance, the lender ſupplies the borrower with money to purchaſe thoſe effects,

Pothier, Tr. du pret. a l. groſſe Avant. not. 6.

effects, upon which he is to run the risk: not so with the insurer. There are also other various other distinctions.

* But however similar they may be in other respects, they differ very much in point of antiquity. We have formerly endeavoured to shew, that the contract of insurance was certainly unknown to the traders of the ancient world: but it is equally clear that with the contract of bottomry and respondentia, or what was equivalent to it, they were perfectly acquainted. In those fragments of the famous sea laws of the *Rhodians*, which have been preserved and transmitted to our times, I think there are very evident traces of this species of contract. In one section it is said, "that when masters of ships, who "are proprietors of one third of the lading, take up mo- "ney for the voyage, whether for the outward or homeward "bound, or both; all transactions shall pass according to the "writings drawn up between the master and lender, and the "latter shall put a man on board the ship to take care of his "loan." But in another place, these laws speak more explicitly, and with a direct reference to the distinction between naval interest, and that which is given for a land risk. "If "masters or merchants borrow money for their voyages, the "goods, freight, ships, and money being free, they shall not "make use of surety-ship, unless there be some apparent dan- "ger either of the sea, or of pirates. And for the money so "lent, the borrowers shall pay *naval interest*." From these two quotations, little doubt can be entertained, but that the *Rhodians* used to borrow and lend, upon the hazard of the voyage, for an increased premium. It was formerly seen, that the *Rhodian* laws in general were adopted by the *Romans*; and consequently that branch of them, which relates to bottomry amongst the rest; for you can hardly open a book upon the *Roman* law, but you meet with chapters, *de nautico fœnore*, *de nauticis usuris*, which plainly shew that this contract was well known to the jurists of that distinguished nation. It was also called by them *pecunia trajectitia*: because it was given to the borrower to be employed by him in commerce upon, and beyond the sea. It appears from *Valin*, that some writers of the *French* nation had supposed, that this contract was wholly unknown to the ancients, and that it was peculiar to *France* alone. *Valin* very clearly exposes the absurdity of such an idea; and it seems to be sufficiently answered, if deserving of an answer, by what has been already said. In addition to this * we may add, that so far from being peculiar to *France*, it has obtained a place in the codes of all the maritime states, whose laws have been promulgated, or have been at all famous in the modern world. In this chapter we have already had occasion to cite two passages from the judgments, or laws of *Oleron* upon the subject, as well as the 60th article of the laws of the *Hanse* towns:

* P. 415 Vide the Introduction.

Leg. Rhod. s. 1. art. 21.

Leg. Rhod. s. 2. art. 16.

Digest. lib. 22. tit. 2. Cod. lib. 4. tit. 33.

2 Valin, Com. 1.

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Art 1 and 22.

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towns: and by a reference to the 45th article of the laws of *Wiſbuy*, it will be found, the nature of bottomry, as well as its name, was perfectly known to the makers of thoſe ordinances.

Laws of Wiſb. art. 45.

In the *Guidon*, indeed, it is ſuppoſed that the contract of bottomry now in uſe, is not at all the ſame, as that which was known to the ancients. This authority is reſpectable, but facts muſt ſpeak for themſelves; in addition to which, the celebrated *Emerigon* has obſerved, that the aſſertion of the author of the *Guidon* is only true with reſpect to the form, which the modern regulations have given to this contract, the true origin of which is loſt in its antiquity.

Le Guid. c. 18. art. 2.

2 Emerigon, p. 384.

In our definition of bottomry it was ſaid, that if the ſhip arrive ſafe, the lender ſhall be paid his principal, and the ſtipulated intereſt due upon it; however much it exceed the legal rate. The true principle, upon which this is allowed, is not merely the great profit and convenience of trade, as has frequently been urged; but the riſk which the lender runs of loſing both principal and intereſt; for he runs the contingency of winds, ſeas, and enemies. It is therefore of the eſſence of a contract of bottomry, that the lender run the riſk of the voyage; and that both principal and intereſt be at hazard: for if the riſk go only to the intereſt of premium, and not to the principal alſo, though a real and ſubſtantial riſk be inſerted, it is a contract againſt the ſtatute of uſury, and therefore void. This has been frequently ſo determined in our courts of law; and it is conſonant to the ideas of foreign writers.

Molloy. lib. 2. c. 11. ſ. 8. 13.

2 Vezey, 148.

2 Vezey, 154.

12 Anne, ſtat. 2. c. 16.

Pothier, Not. 16.

An action of debt was brought upon an obligation. The defendant pleaded the ſtatute of uſury, and ſhewed, that a ſhip went to fiſh in *Newfoundland*, (which voyage might be performed in eight months) and that the plaintiff delivered 50*l.* to the defendant, to pay 60*l.* upon the return of the ſhip off * *Dartmouth*: and if the ſaid ſhip, by occaſion of leakage or tempeſt, ſhould not return from *Newfoundland* to *Dartmouth*, then the defendant ſhould pay the 50*l.* only; and if the ſhip never returned, he ſhould pay nothing. And it was held, by all the court, not to be uſury within the ſtatute. For if the ſhip had ſtayed at *Newfoundland* two or three years, he ſhould have paid at the return of the ſhip but 60*l.*: and if the ſhip never returned, then nothing; ſo that the plaintiff ran hazard of having leſs than the intereſt, which the law allows; and poſſibly, neither principal nor intereſt.

Sharpley v. Hurrell. Cro. Jac. 208.

* P. 417

This caſe was, upon another occaſion, mentioned in argument by one of the judges on the Bench; the principle, on which it was decided, was recognized, and the caſe itſelf allowed to be law.

Roberts v. Trenayne. Cro. Jac. 318.

So alſo in another caſe of debt upon an obligation, conditioned to pay ſo much money, if ſuch a ſhip returned within ſix months from

Joy v. Kent. Hard. Rep. 413.

from *Oſtend* in *Flanders* to *London*, which was more by the third part than the legal intereſt of money; and if ſhe do not return, then the obligation to be void: the defendant pleaded, that there was a corrupt agreement betwixt himſelf and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he ſhould have no more for intereſt than the law permits, in caſe the ſhip ſhould ever return; and avers that the obligation was entered into by covin, to evade the ſtatute of uſury, and the penalty thereof: upon this averment the plaintiff took iſſue, and the defendant demurred.

Lord Chief Baron *Hale*.—Clearly this bond is not within the ſtatute, for this is the common way of inſurance; and if this were void by the ſtatute of uſury, trade would be deſtroyed. It is not like to the caſe, where the condition of the bond is to give ſo much money, if ſuch or ſuch a perſon be then alive; for there is a certainty of that at the time. But it is uncertain and a caſualty whether ſuch a ſhip ſhall ever return or not.

In another caſe of debt upon an obligation for 300*l*. the condition was, that if ſuch a ſhip went to *Surat* in the *Eaſt Indies*, and returned ſafe; or if the owner, or the goods laden on board the ſhip returned ſafe, then the defendant was to pay the principal to the plaintiff, and 40*l*. for each 100*l*.; but that if the ſhip ſhould periſh by unavoidable caſualties of ſea, fire, or enemies, to be proved by ſufficient teſtimony, then the plaintiff ſhould have nothing. The doubt was, whether this was an uſurious contract: and it was ſaid to be ſo, becauſe the payment depended upon ſo many things, one of which in all probability would happen. But the whole court held it not to be within the ſtatute. Soome v. Ch. 1 Sider ſin. 27. 28. 1 Levinz. 5. S. C. * P. 418

Lord Chief Juſtice *Bridgman* took a diſtinction between a bargain of this kind, and a loan: for where there is a bargain, as here, and the principal is hazarded, that cannot be within the ſtatute of uſury: but it is otherwiſe of a loan, where the principal is not in danger. Here there are apparent riſks of the ſea, fire, and enemies, and the length of the voyage; all of which endanger the loſs of the principal. Theſe bottomry contracts are for the advancement of trade, and therefore judgment muſt be for the plaintiff.

Theſe caſes are all uniform in the principle which they go to eſtabliſh, that on account of the riſk, the intereſt ſhall be larger than the common rate: but notwithſtanding this, a caſe is to be found in the Equity Reports, which directly tends to deſtroy the rule of deciſion in all theſe caſes.

A part owner of a ſhip borrowed money of the plaintiff upon a bottomry bond, payable on the return of the ſhip from the voyage, ſhe was then going in the ſervice of the *Eaſt India Company*, who broke up the ſhip in the *Eaſt Indies*; and the owners brought their action againſt the Company, and recover- Dandy v. Turner. 1 Equity Caſes Abr. 372.

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ed damages, which did not, however, amount to a full ſatisfaction. The plaintiff brought his bill to have his proportionable ſatisfaction out of the money recovered; but his bill was diſmiſſed, and he was left to recover as well as he could at law; for a court of equity will never aſſiſt a bottomry bond, which carries *unreaſonable intereſt*.

This caſe conveys a very unmerited cenſure upon bottomry bonds, not at all warranted by the long chain of uniform deciſions in their favor. Indeed, from the very nature of the contract, they are to carry the naval intereſt, which is always

* P. 419 * greater than land intereſt, in proportion as the riſks run by the lender on bottomry are much greater than thoſe which a lender upon common bonds incurs.

4 Com. Dig. 193. 2 Vezey, 146.

To be ſure if a contract were made, by colour of bottomry, in order to evade the ſtatute, it would be uſurious and void, and highly deſerving of all the cenſure and diſcouragement which the courts, either of law or equity, could poſſibly throw upon it.

In *England* then it is clear, from theſe caſes, that there is nothing unlawful in the contract of bottomry: but ſome writers in foreign countries have endeavoured to hold it up to the world, as an illicit and an uſurious bargain. *Straccha*, who has written upon inſurances, has introduced a long diſſertation to prove the truth of this poſition; and ſeveral other writers have either preceded or followed him in ſupport of the ſame doctrines. If, indeed, the money ſo lent, were given merely by way of a loan, and ſuch exceſſive intereſt were demanded for the uſe of the money only, there might be force in the objection. But when it is conſidered as the price of the great riſks incurred, it has not the leaſt ſemblance of uſury; it is a fair and conſcientious contract, highly beneficial to the commerce and general intereſts of ſociety.

Introd. de Aſſecur. Not. 26.

Theſe authors have met with very able oppoſers in *Pothier* and *Emerigon*, who have clearly ſhewn the fallacy of their doctrine; and they have proved to demonſtration, that even the fathers of the church have acknowledged, that this contract has nothing in it offenſive to religion or goods morals. Almoſt all the writers of eminence agree with the two laſt named, as to the legality of loans on bottomry and at reſpondentia: and it is now univerſally admitted and practiſed in all the maritime and trading countries in *Europe*.

Pothier Avanture a la groſſe. Not. 2. 2 Emer. 390. Loccenius, lib. 2. c. 6. Not 3. Roccus de Navibus et Naulo. not. 50. 2 Black Com. 457.

But as the hazard to be run is the very baſis and foundation of this contract; it follows, that if the riſk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the ſtatutes of uſury might be evaded. This was ſo decided in the Court of Chancery.

* P. 420 * The caſe was upon a bottomry bond, whereby the plaintiff was bound in conſideration of 400*l.* as well to perform the

voyage

voyage within ſix months, as at the ſix months end to pay the 400*l.* and 40*l.* premium, in caſe the veſſel arrived ſafe, and was not loſt in the voyage. It happened that the plaintiff never went the voyage, whereby the bond became forfeited, and he now preferred his bill to be relieved. Upon the former hearing as the ſhip lay all the time in the port of *London*, and there was no hazard of loſing the principal, the Lord Keeper thought fit to decree, that the defendant ſhould loſe the premium of 40*l.* and be contented with his principal and *ordinary intereſt*. And now, upon a rehearing, he confirmed his former decree.

Deguilder v. Depeiſter. 1 Vern. 263.

With this decree, which is equitable and juſt, the *French* writers agree. They ſay that in ſuch a caſe, "L'emprunteur "ſera bien obligé de rendre la ſomme qui lui a été prêtée, mais "il ne ſera pas obligè de payer en outre la ſomme qu'il a promis "de payer pour le profit maritime; car le profit maritime ètant "le prix des riſques que le prêteur devoit courir des effects ſur "leſquels le prêt a ètè fait, il ne peut lui être dûde profit mari-"time quand il n'a couru aucuns riſques, ne pouvant pas y avoir "un prix des riſques, s'il n'y a pas eu de riſques."

Fothier Traite a la Groſſe Avanture Not. 38. 2 Valin 10.

Bottomry bonds generally expreſs from what time the riſk ſhall commence, as that the ſhip ſhall ſail from *London* to ſuch a port aboard, &c. In ſuch caſes, the contingency does not commence till the departure: and therefore if the ſhip receive injury by ſtorm, fire, &c. before the beginning of the voyage, the perſon borrowing alone runs the hazard. But if the condition be, "that if the ſhip ſhall not arrive at ſuch a place by ſuch a time, then &c." in theſe inſtances, the contract commences from the time of ſailing, and a different rule as to the loſs, will neceſſarily prevail.

Vide the Appendix. No. 2.

Beawes Lex Merc. Red. 4th edit. p. 127.

We have ſhewn at the beginning of this chapter, that the amount of the loan on bottomry or reſpondentia, in this country is not reſtrained by any regulation whatever; although it is in many maritime ſtates by expreſs ordinances: that the only reſtriction in the law of *England* is, with reſpect to money lent on ſhips and goods going to the *Eaſt Indies*, which, by ſtatute, muſt not exceed the value of the property on which the loan is made. It remains then to ſee what thoſe riſks are, to which the lender undertakes to expoſe himſelf. Theſe are for the moſt part mentioned in the condition of the bond, and are nearly the ſame, againſt which the underwriter, in a policy of inſurance, undertakes to indemnify. "*Limita hoc ſingulariter, ut creditor "ſubeat periculum navigationis, in caſibus fortuitis tantum.*" Theſe accidents are, tempeſts, pirates, fire, capture, and every other misfortune, except ſuch as ariſe either from the defects of the thing itſelf, on which the loan is made, or from the miſconduct of the borrower: for, ſays the *Italian* lawyer, laſt quoted, in continuation of the above ſentence, "*Secus eſt ſi infortunium "vel naufragium ex culpâ debitoris proceſſerit, quia tunc creditor*

2 Magens. 28. 166.

19 Geo. 2. c. 37. ſ. 5.

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Vide the Appendix. No. 2.

Roccus de Navibus. Not. 51.

2 Valin. 14. Roccus loc. cit.

"*non*

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" *non tenetur de periculo, et damno, in quod incurritur ex culpâ vehentis, prout in simili deciditur in materiâ assecurationis, ut quantumcumque assecuratio sit generalis, non contineat periculum, aut damnum, quod facto assecurati contingit.*"

Barton v. Wolliford. Comb. 56.

It seems to have been a doubt late in the last century, whether a loss by the attacks of pirates was a risk which the lender on bottomry had by his contract undertaken to bear; for it was argued in the King's Bench, in the reign of *James* the Second. But the court were of opinion, that piracy was one of the dangers of the seas; and the defendant had judgment.

The lender is answerable likewise for losses by capture; or to speak more accurately, if a loss by capture happen, he cannot recover against the borrower; but in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned in the condition) the bond is not forfeited, and the obligee may recover.

Joyce v. Williamson, B. R. Mich. Term. 23 Geo. 3.

This doctrine was laid down by the whole Court of King's Bench, in a case upon a bond of this nature; the proceedings on which were fully stated, when the unanimous opinion of the court was delivered by Lord *Mansfield*. This comes before the court upon a motion, on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ship's safe

* P. 422 *arrival at *New York*, a certain sum of money should be paid to the plaintiff; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded three pleas: 1st, *Non est factum*; 2dly, That the ship did not arrive at *New York*, the port of destination; 3dly, That the ship was captured. Upon the two first pleas issue was joined; and to the last, there was a replication of recapture. The facts, which appeared in evidence on the trial are these: *the ship was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her stores; at which time *she was retaken* by an *English* privateer, and carried into *Halifax*. The Admiralty Court adjudged her to be a good prize to the *English* privateer, and decreed that she should be restored to the original owners, on paying one eighth for salvage: that she proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now it is clear, that, by the law of *England*, *there is neither average nor salvage upon a bottomry bond*. It was indeed contended at the bar, on the part of the defendant, that this case was within the saving of the bond; for it is provided, that in case of loss by *capture*, &c.

&c. the bond ſhould be void: and that here there was a capture, and a detention for one month. But upon conſideration, we think that a capture within this condition, does not mean a *temporary capture*, but it *muſt be a total loſs:* now here it was not ſuch a capture as to occaſion a total loſs. The voyage was not loſt, for the defendant purſued it and earned his freight. Freight depends upon the ſafety of the ſhip; and as the freight was earned, the ſhip muſt have arrived ſafe at the port of deſtination. In whatever way we determine this caſe, there muſt be a hardſhip: but we are all of opinion, that the verdict is right, and that the rule for a new trial muſt be diſcharged.

From this caſe we not only learn what ſhall be deemed a capture, within the meaning of that word in a bottomry bond, but we derive from it a piece of very eſſential information, namely, that a lender on bottomry, or at reſpondentia, is neither intitled to the benefit of ſalvage, nor liable to contribute in caſe of a general average. This was expreſsly ſaid by * Lord *Mansfield* in delivering the judgment of the court. His Lordſhip's opinion is confirmed by the ſtatute of the 19th of George the Second, c. 37. which allows the benefit of ſalvage to lenders upon ſhips or goods going to the *Eaſt Indies*; clearly ſhewing that there was no ſuch thing at the Common Law, otherwiſe there was no occaſion to make ſuch a proviſion.

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19 Geo. 2. c. 37. ſ. 5.

In this reſpect our law differs from that of *France*, for the ordinances, and indeed it ſeems always to have been the caſe in that country, expreſsly declare, that the lenders on bottomry ſhall be ſubject to general or groſs average, in the ſame manner as inſurers are upon policies of inſurance; for that as theſe contracts depend upon the ſame principles, they are ſubject to the ſame regulations.

Le Guidon, c. 19. Art. 5. 2 Valin. 19. 2 Emer. 504.

Our law in this reſpect is different alſo from that of *Denmark*. This lately appeared in a cauſe tried in the King's Bench before Lord *Kenyon* at *Guildhall*.

It was an action on a policy of inſurance upon a *reſpondentia* bond on ſhip and goods, at and from *B.* to *C.* The ſhip was *Daniſh*, and an average loſs was ſuſtained upon the goods to the amount of 6*l.* 15*s. per cent.* and the plaintiff as holder of a *reſpondentia* bond, had been called upon to contribute; and now brought his action againſt the *Engliſh* underwriters for the amount of that contribution.

Walpole v. Ewer. Sitt. after Trin. 1789.

Lord *Kenyon* Chief Juſtice.—By the law of *England*, a lender upon *reſpondentia* is not liable to average loſſes; but is entitled to receive the whole ſum advanced, provided ſhip and cargo arrive at the port of deſtination. The plaintiff contends, that as by the law of *Denmark*, ſuch lenders upon reſpondentia are liable to average, and bound to contribute according to the amount of their intereſt, the inſurer muſt an-

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swer to them. The *Danish* Consul has proved that he received a judgment of the Court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side: but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight, than the opinions of advocates, however emi-
* P. 424 * nent, or even than the extrajudicial opinions of the most able judges. It seems as if in this case, the underwriters were bound by the law of the country, to which the contract relates. Verdict for the plaintiff. (*a*)

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the track of the voyage

(*a*) This is not the only case, in which the insurers have been held liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved; and upon that the learned judge much relied.

Newman v. Cazalet. Sitt. at Guildh. after Hilary,

It was an action on a policy, upon a cargo of fish from *Newfoundland* to any port of *Spain*, *Portugal*, or *Italy*. The ship met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain being owner, presented a petition to the commercial court of *Pisa*, to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course (which appears to be a very extraordinary one) adjusted the loss by charging the cargo at its full value, but the ship only at one half, and the freight at one third: and they also charged as a part of the general average, the seamens wages and provisions, while in port. The defendant, as underwriter, had paid into court as much as would cover the average; if adjusted according to the memorandum in the policy, and the law and usage of *England*. The question was, whether the plaintiff having been compelled to pay beyond that sum according to the calculation of the sentence of the court of *Pisa*, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard. The plaintiff called several brokers, who said that in repeated instances they had adjusted averages under similar sentences of the court of *Pisa*; and the underwriters, though with reluctance, had always paid them.

Mr. Justice *Buller*.—On the general law, the plaintiff would fail; but in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of *English* law. But if you are satisfied it has been the usage, upon the evidence given it ought not to be shaken. The plaintiff had a verdict accordingly.

voyage, the event has not happened, upon which the borrower was to be discharged from his obligation. This has been decided in several cases.

Western v. Wilcy. Skin. 152.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the *East India Company*, and that it was to obey such orders as they or their factors * should give; and that she was designed for a voyage from *London* to *Bantam*, and from thence to *China* or *Formosa*. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*: if from *London* to *Bantam*, and from thence to *China* or *Formosa*, and returned to *London* within 24 months 650*l.* If she returned not within 24 months, then to pay 5*l.* per month above 650*l.* till the 36 months; and if she returned not within 36 months, then to pay 710*l.* unless it can be proved by *Wildy*, that the ship returned not, but was lost within 36 months. The ship in fact, went from *London* to *Bantam*, and from *thence to Surat*, and other parts, and so returned to *Bantam*: and in her voyage from *Bantam* to *London*, was lost within 36 months: upon which the present action was brought.

* P. 425

The court inclined to be of opinion, that this ship having deviated from the voyage described, in going to *Surat*, the plaintiff was not to bear the loss, and was consequently entitled to recover. They, however, took time to deliberate; and after consideration, gave judgment for the plaintiff.

Williams v. Steadman. Holt's Reports, 126. Skin. 345. S. C.

In another case of debt upon a bottomry bond, the defendant pleaded, that the ship went from *London* to *Barbadoes*, *sine deviatione*, and afterwards she returned from *Barbadoes* towards *London*, and in her return was lost *in voyagio prædicto*; the plaintiff replied, that the ship in her return went from *Barbadoes* to *Jamaica*; and that after a stay there, she returned from *Jamaica* towards *London*, and was lost, and so shews a deviation. The defendant rejoined, that she was pressed into the king's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ship went from *London* to *Barbadoes* without deviation, and that in the return she was lost in the voyage aforesaid; but it does not shew *without deviation*. Now the condition is so in express words, and he ought to shew expressly that he has performed the words of the condition.

* The same rule of decision has been adopted in the Courts of Equity.

* P. 426

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The plaintiff entered into a penal bond to pay 40*s.* per month for 50*l.*: the ſhip was to go *from Holland to the Spaniſh iſlands, and to return to England:* but if ſhe periſhed, the defendant was to loſe his 50*l.* The ſhip went accordingly to the *Spaniſh* iſlands, took in *Moors* at *Africa*, then went to *Barbadoes*, and periſhed at ſea. The plaintiff, being ſued at law upon the bond, came into equity, ſuggeſting that *the deviation was through neceſſity*. But this bill was diſmiſſed, except as to the penalty.

1 Equity Caſes Abr. 372. 2 Ch. caſes 130.

There is no reſtriction by the law of *England* as to the perſons, to whom money may be lent on bottomry, or at reſpondentia. (*a*) In a former part of this work, we gave the hiſtory of a ſtatute introduced into our code of laws, to prevent inſurances from being made on the ſhips or goods of *Frenchmen*, during the then exiſting war with *France*. The ſame ſtatute alſo prohibited his Majeſty's ſubjects from lending money on bottomry or at reſpondentia on any ſhips or goods belonging to *France*, or to any of the *French* dominions or plantations, or the ſubjects thereof: and in caſe they ſhould, ſuch contracts were declared void; and the parties thereto, or the agent or broker interfering therein, were to forfeit 500*l.* That act was not of long continuance, on account of the peace which almoſt immediately followed it: and probably for the reaſons, which were urged by the eminent ſpeakers of thoſe days and which we formerly took an opportunity of inſerting, theſe reſtraints upon this ſpecies of contract were never again revived by any ſubſequent law.

C. 1. p. 14.

21 Geo. 2. c. 4.

Lex Mere. Red. 4th ed. p. 128.

It frequently happened, as appears by the preamble to the ſtatute, that the borrowers on bottomry, or at reſpondentia, became bankrupts after the loan of the money, and before the event happened, which entitled the lender to repayment: by which means the debt could not be proved under the commiſſion and the lenders were left to ſuch redreſs as they could obtain from the bankrupt, who had previouſly given up every thing to his other creditors. This being likely to prove a diſcouragement to trade, parliament was obliged to interpoſe; and it accordingly enacted, "That the obligee in any bottomry "or reſpondentia bond, made, and entered into upon a good "and valuable conſideration, *bonâ fide*, ſhould be admitted to "claim, and *after the contingency ſhould have happened, to prove "his, or her debt or demands in reſpect of ſuch bond, in like manner "as if the contingency had happened before the time of the iſſuing "of the commiſſion of bankruptcy againſt ſuch obligor*, and ſhould "be entitled unto, and ſhould have and receive a proportion"able part, ſhare, and dividend of ſuch bankrupt's eſtate, in "proportion

* P. 427

19 Geo. 2. c. 32. ſ. 2.

(*a*) See one exception as to loans on the ſhips of foreigners trading to the *Eaſt Indies*, ante page 411.

"proportion to the other creditors of such bankrupt, in like "manner as if such contingency had happened before such "commission issued: and that all and every person or persons, "against whom any commission of bankruptcy should be "awarded, should be discharged of and from the debt or debts "owing by him, her, or them, on every such bond as afore-"said, and should have the benefit of the several statutes now "in force against bankrupts, in like manner, to all intents "and purposes, as if such contingency had happened, and "the money due in respect thereof had become payable, be-"fore the time of the issuing of such commission."

By the statute books it appears, that the masters and mariners of ships having taken upon bottomry greater sums of money than the value of their adventure, had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners: it was therefore enacted, "That if any captain, master, "mariner, or other officer belonging to any ship, should wilfully "cast away, burn, or otherwise destroy the ship unto which he "belonged, or procure the same to be done, he should suffer "death as a felon." The duration of this act having been limited to three years, it became extinct: but the necessity of such a provision was so great, that a similar law was made a few years afterwards, and is still in force. 16 Cha. 2. c. 6. s. 12. 22 and 93 Cha. 2. c. 11. s. 12.

As the commerce of the country increased to an amazing degree, so the custom of lending money on bottomry became also very prevalent: and as the lenders had subjected themselves to great risks, they began to think it necessary to protect their property by insuring to the amount of the money lent. In a former chapter, much was said of the mode by which insurances on such property were to be effected; and we then saw from the case of *Glover* v. *Black*, that it was necessary to insert in the policy that the interest insured was bottomry or respondentia, and that such was the law and practice of merchants. From this case too it is evident, that when a person has insured a bottomry or respondentia interest, and he recovers upon the bond, he cannot also recover upon the policy: because he has not sustained a loss within the meaning of his contract; and to suffer any man to receive a double satisfaction would be contrary to the first principles of insurance law. As it is merely a contract of indemnity, a man shall never receive less; nor can he be entitled to recover more than the amount of the damage he has, in fact, sustained.

* P. 428

Vide ante c. 1. 3 Burr. 1394.

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*CHAPTER THE TWENTY-SECOND.

* P. 429

Of Insurances upon Lives.

1 Postlethw. Dict. of Tr. p. 150.

AN Insurance upon Life is a contract, by which the underwriter for a certain sum, proportioned to the age, health, profession, and other circumstances of the person, whose life is the object of insurance, engages that that person shall not die within the time limited in the policy: or if he do, that he will pay a sum of money to him in whose favour the policy was granted. Thus if *A.* lend 100*l.* to *B.* who can give nothing but his personal security for repayment: in order to secure him, in case of his death, *B.* applies to *C.* an insurer, to insure his life in favour of *A* by which means, if *B.* die within the time limited in the policy, *A.* will have a demand upon *C.* for the amount of his insurance.

Vide the Appendix, No. 3.

2 Blackst. Com. 459.

1 Postlethw 150.

The advantages resulting from such insurances are many and obvious: and most of them may be reduced under the following classes. To persons possessed of places or employments for life; to masters of families, and others, whose income is subject to be determined, or lessened, at their respective deaths; who, by insuring their lives, may secure a sum of money for the use of their families. To married persons, where a jointure, pension, or annuity, depends on both or either of their lives, by insuring the life of the persons entitled to such annuity, pension or jointure. To dependents upon any other person, during whose life they are entitled to a salary or benefaction, and whose life being insured, will enable such dependents, at the death of their benefactor, to claim from the insurers a sum equal to the premium paid. To persons wanting to borrow money, who, by insuring their lives, are enabled to give a security for the money borrowed. These, and many other advantages, being so obvious, the Bishop of *Oxford*, Sir *Thomas Allen*, and some other gentlemen, were induced to

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* apply to Queen *Anne* to obtain her charter for incorporating them and their successors, whereby they might provide for their families, in an easy and beneficial manner. Accordingly, in the year 1706, her Majesty granted her royal charter, incorporating them by the name of "The Amicable Society for a perpetual "Assurance Office," giving them a power to purchase lands, an ability to sue and be sued in their corporate capacity, and a common seal for the more easy and expeditious management of the affairs of the Company.

The

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The benefits, which accrued to the public from this ſpecies of contract, were found to be ſo extenſive, that another office was eſtabliſhed by deed enrolled in the court of King's Bench at *Weſtminſter*, for the inſurance of lives only. The name of this office is the "*ſociety for equitable aſſurance on lives and ſurvivorſhips.*" Beſides this, the two Companies of the *Royal Exchange* and *London* Aſſurance, obtained his Majeſty's charter, to enable them alſo to make inſurances on lives. The charter points out the advantages of ſuch inſtitutions; for it ſtates as the ground, on which ſuch a permiſſion is to be granted, "That "it has been found by experience to be of benefit and advan- "tage, for perſons having offices, employments, eſtates, or "other incomes, determinable on the life or lives of themſelves "or others, to make aſſurances on the life or lives, upon which "ſuch offices, employments, eſtates, or incomes are deter- "minable." Private underwriters alſo may enter into policies of this nature, as well as any other, provided the party, making the inſurance, chuſes to truſt their ſingle ſecurity.

The antiquity of this practice cannot be very eaſily aſcertained; however we find traces of it in ſome very old authors In the *French* book entitled *Le Guidon*, we find it mentioned, as a contract perfectly well known, at that time, in other countries. The author of that book, however, tells us in the ſame paſſage, that it was a ſpecies of contract wholly forbidden in *France*, as being repugnant to good morals, and as opening a door to a variety of frauds and abuſes. Such indeed, the law *of France* continues at this day: and inſurances upon lives are prohibited in other countries of *Europe* by poſitive regulation. The ſame *French* author has, however, gone a little too far in aſſerting, that the other countries, in which they had been till that time encouraged, were alſo obliged to forbid them. This had not certainly taken place at that time, as may be inferred from the 66th article of the laws of *Wiſbuy*: and in *England* they never had been prohibited. The learned *Roccus* alſo takes notice of them as legal contracts, and quotes various authors in ſupport of his opinion.

Le Guidon, c. 16. art. 5. publiſhed in 1661.

2 Valin. 54.

2 Magens. 70.

Le Guid. loc. cit.

* P. 431

Roccus de Aſſec. Not. 74.

Theſe inſurances being thus ſanctioned in *England* by royal authority, and the funds of the different ſocieties having very much increaſed, and being fixed on a ſtable and permanent foundation, contracts of this nature became ſo much a mode of gambling (for people took the liberty of inſuring any one's life, without heſitation, whether connected with him, or not, and the inſurers ſeldom aſked any queſtion about the reaſons, for which ſuch inſurances were made,) that it at laſt became a ſubject of parliamentary diſcuſſion. The reſult of that diſcuſſion was, that a ſtatute paſſed, by which it was enacted, "That no "inſurance ſhould be made by any perſon or perſons, bodies "politick or corporate, *on the life or lives* of any perſon or per-

1 Mag. 33

14 Geo. 3. c. 48. ſ. 1.

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" persons, or on any other event or events whatsoever, wherein " the person or persons, for whose use, benefit, or on whose " account, such policies should be made, *should have no interest*, " *or by way of gaming or wagering*; and every insurance made, " contrary to the true intent and meaning thereof, should be " null and void to all intents and purposes." And in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain, what the interest of the person, entitled to the benefit of the insurance, really was, it was further enacted, by the same statute, " that it should not be lawful " to make any policy or policies on the life or lives of any per- " son or persons. or other event or events, without inserting in " such policy or policies the person's name interested therein, " or for whose use, benefit, or on whose account, such policy " was so made or underwrote. And that in all cases where the " insured had an interest in such life or lives, event or events, " no greater sum should be recovered, or received from the in- " surer or insurers than the amount or value of the interest " of the insured in such life or lives, or other event or " events."

Sect 2.

Sect 3.

* P. 432

* It has been held that a person, holding a note given for money won at play, has not an insurable interest in the life of the maker of the note.

Dwyer v. Edie. London Sittings after Hil. 1788.

An action was brought on a policy on the life of *James Russell* from the 1st of *June* 1784 to the 1st of *June* 1785. *Russell* was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the sum of 5000*l.* due from *Russell* to the plaintiff, for which he had given his note payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant: 1st. That part of the consideration for the note was money won at play: 2dly. That *Russell* at the time he gave the note was an infant.

Mr. Justice *Buller* nonsuited the plaintiff upon the ground of part of the consideration of the note being for a gaming transaction; and therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy the interest must be contingent, for *Russell* might or might not avoid his note; and he doubted much whether till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection. *(a)*

The

Cowper, 737. Mollison v. Staples. Sittings at Guildhall. Mic. Vac. 1778.

(a) There is a case of *Roebuck* v. *Hammerton*, in which a policy made, in order to decide upon the sex of a particular person, was held to fall within the prohibition of this statute. In another case, a policy having been made, on the event of there being an open trade between *Great Britain* and the province

The remaining obſervations and rules upon this ſubject are very few and ſhort: becauſe thoſe general rules and maxims, upon which ſo much has been ſaid with regard to inſurances in general, are alſo applicable to this ſpecies of them: the ſame mode of conſtruction is to be adopted; fraud will equally affect the one as the other; the ſame attention muſt be paid to a rigid compliance with warranties; and the ſame rules of proceeding are to be followed.

* With reſpect to the riſk, which the underwriter is to run this is uſually inſerted in the policy; and he undertakes to anſwer for all thoſe accidents to which the life of man is expoſed, unleſs the *ceſtuy que vie* put himſelf to death, or he die by the hand of juſtice. The policy as to the riſk, generally runs in theſe words: "The ſaid inſurers, in conſideration of the ſum "paid, do aſſure, aſſume, and promiſe, that the ſaid *A. B.* "ſhall, by the permiſſion of Almighty God, live and continue "in this natural life for and during the ſaid term, or in caſe he "the ſaid *A. B.* ſhall, during the ſaid time, or before the full "end and expiration thereof, happen to die by any ways or "means whatſoever, ſuicide or the hands of juſtice excepted, "then, *&c.* We ſee, that this contract expreſsly ſays, the death muſt happen within the time limited, otherwiſe the inſurers are diſcharged. But ſuppoſe a *mortal wound* is received during the exiſtence of the policy, and the perſon languiſhes till after the term limited in the contract, what ſays the law? Agreeably to the deciſion of this point, in caſes of marine inſurances, not only the cauſe of the loſs, but the loſs itſelf, muſt actually happen, during the time named in the policy, otherwiſe the inſurers are not reſponſible. This very caſe was put by Mr. Juſtice *Willes*, in his argument, when delivering the opinion of the Court, in the caſe of *Lockyer* v. *Offley*. Suppoſe, ſaid the learned judge, an inſurance upon a man's life for a year, and ſome ſhort time before the expiration of the term, he receive a mortal wound, of which he dies after the year, the inſurer would not be liable.

* P. 433

Vide the Appendix. No. 3.

Vide ante c. 2. p. 31.

Vide ante p. 33.

But when an inſurance is made upon a man's life, who goes to ſea, and the ſhip in which he ſailed was never afterwards heard of, the queſtion, whether he did or did not die within the term inſured, is a fact for the jury to aſcertain from the circumſtances, which ſhall be produced in evidence.

Thus

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vince of *Maryland*, on or before the 6th of *July* 1778, Lord *Mansfield* ſaid, that it was clear the plaintiff could not recover. 1ſt. Is this an intereſt within the act? It was made to prevent gambling policies. Every man in the kingdom has an intereſt in the events of war and peace; but I doubt whether that be an intereſt within the act. But 2dly, The policy is void, by not having the name inſerted according to the 2d ſection of the ſtatute.

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Patterſon v. Black Sittings at Guildhall, Hill. Vac. 1780.

Thus in an action on a policy of inſurance on the life of *L. Macleane*, Eſq; from the 30th of *January* 1772, to the 30th of *January* 1778, it appeared in evidence, that about the 28th of *November* 1777, *Macleane* ſailed from the *Cape of Good Hope* in the *Swallow* ſloop of war, which ſhip not being afterwards heard of, was ſuppoſed to have been loſt in a ſtorm, off the Weſtern Iſlands. The queſtion was, whether *Macleane* died * before the 30th of *January* 1778. In order to eſtabliſh the affirmative of that queſtion, the plaintiff called witneſſes to prove the ſhip's departure from the *Cape* with *Macleane*; and ſeveral captains ſwore, that they ſailed the ſame day; that the *Swallow* muſt have been as forward in her courſe as they were on the 13th or 14th of *January*, the period of a moſt violent ſtorm, in which ſhe probably was loſt. That the *Swallow* was much ſmaller than their veſſels, which, with difficulty, weathered the ſtorm.

* P. 434

Lord *Mansfield* left it to the jury, whether, under all the circumſtances, they thought the evidence ſufficient to convince them, that *Macleane* died before the time limited in the policy; adding, that if they thought it ſo doubtful as not to be able to form an opinion, the defendant ought to have their verdict. The jury found for the plaintiff.

Lex Merc. Red. 4th. edit. p. 294.

Theſe inſurances, when a loſs happens upon them, muſt be paid according to the tenor of the agreement, in the *full ſum* inſured, as this ſort of policy, from the nature of it, being on the life or death of man, does not admit of the diſtinction between total and partial loſſes.

We have ſeen that private perſons, as well as the public companies, may be underwriters upon policies on lives; and as they frequently became bankrupts after the policy was underwritten, but before a loſs happened, it became a queſtion, whether the perſons intereſted in ſuch inſurances could claim the money, and prove the debt, under the commiſſion, as if the loſs had happened before it iſſued. In the chapter immediately preceding this, and in one prior to that, we took occaſion to obſerve, that in order to remedy an inconvenience of this nature with reſpect to marine inſurances and bottomry bonds, a ſtatute had paſſed allowing creditors, either on ſuch policies, or bottomry and reſpondentia bonds, to prove their debts under the commiſſion, as if the loſs or contingency had happened prior to that event. But as the words of the preamble to that ſection of the ſtatute were ſpecial, referring only to inſurances on ſhips and goods or contracts of bottomry, it was doubtful whether it extended to inſurances on lives, although the words of the enacting part were very general, namely, "the aſſured in *any policy of inſurance*, &c." In ſupport of this doubt it was urged, that great inconveniences would follow from extending the ſtatute to theſe policies, becauſe the riſk may remain unſettled for a long and indefinite number of years. The court, however, held,

Vide ch. 21. and chap. 14.

19 Geo. 2. ch. 37. ſ. 2.

* P. 435

held, that the general words of the enacting part were not reſtrained by the preamble.

This doctrine was laid down in an action on a policy of inſurance on the life of *J. H. Boyd*, lately gone to the *Eaſt Indies* on the event of his dying between the 5th of *April* 1780, and the 5th of *April* 1783. The defendant pleaded; 1ſt, bankruptcy generally; and that the cauſe of action accrued before the bankruptcy: 2dly, that *the policy was made prior to the time of his becoming a bankrupt*, then the trading, petitioning creditor's debt, commiſſion, proceedings, and certificate were ſpecially ſet out, and that he was thereby diſcharged from the ſaid policy, and all debts due at the time of the bankruptcy, without ſaying, that the cauſe of action accrued before the bankruptcy. To this laſt plea, there was a general demurrer.

Cox v. Liotard. B. R. Hill. 24 Geo. 3. Dougl. Rep. 2d edit. p. 160.

Lord *Mansfield*.—The only queſtion is, whether the *enacting words* of this ſtatute, which are *general*, ſhall be reſtrained by the *preamble*, which is *particular*. I think they ſhould not be reſtrained. The enacting clauſe comprehends *all* inſurances, and conſequently inſurances *upon lives*. This is exactly the caſe of *Pattiſon* v. *Banks* (*a*); for there the preamble was *particular*, but the enacting clauſe was *general*.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Mr. Juſtice *Buller*.—In the caſe of *Mace* v. *Cadell*, it was held, that the enacting words of the ſtatute of 21ſt of *Ja.* 1. c. 19, were not reſtrained by the preamble (*b*). The inconveniences

(*a*) The queſtion in *Pattiſon* v. *Banks* (*Cowper* Rep. 540) aroſe upon the 7 *Geo.* 1. ch. 31. which allowed perſons, who had given credit on bills, bonds, notes and other ſecurities, payable at a future day, and which were not payable at the bankruptcy of the debtor, to prove them under the commiſſion. The preamble to the ſtatute ſpeaks of ſecurities only for the ſale of goods and merchandizes; but as the enacting words were general, the court held, that they extended to a bond for the payment of an annuity for a term of years.

(*b*) The ſtatute of *James* enacts, "that if any perſon, at ſuch "time as he ſhall become bankrupt, ſhall, *by the conſent of the* "*true owner*, *&c.* have in his poſſeſſion, &c. any goods, &c. "whereof he ſhall be reputed owner, the commiſſioners ſhall "have power to ſell the ſame in like manner as any other part "of the bankrupts eſtate." The preamble ſays, "whereas it "often happens that many perſons before they become bank-"rupts, *do convey their goods* to other men, upon good conſidera-"tion, and yet retain the poſſeſſion, and are reputed owners "thereof, &c." The court in *Mace* v. *Cadell* (*Cowp.* 232) held that the ſtatute extended to the goods of a *third perſon*, which he allowed the bankrupt to keep poſſeſſion of, as well as to thoſe which *originally* belonged to the bankrupt, although the preamble ſpeaks only of the bankrupt's *original* property.

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niences that have been urged, are not ſo great as are apprehended; for the creditors need not to be delayed in their dividend. When a creditor has an inſurance of this kind, he has nothing to do but to lay it before the commiſſioners, who will make a calculation, and lay aſide as much as will give him a dividend equal to that of the other creditors. There muſt be judgment for the defendant.

* P. 436

It became a doubt in the reign of King *William*, when a policy on a life was to run from the day of the date thereof, till that day twelvemonth, and the perſon died on the day named, whether the inſurer was liable. The court held that he was. The caſe was this: A policy of inſurance was made to inſure the life of Sir *Robert Howard* for one year, from the day of the date thereof; the policy was dated on the 3d day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, about one o'clock in the morning. Lord *Holt* held that from the day of the date excludes the day, but from the date includes it (*a*); ſo that the day, of the date muſt be excluded here, and the underwriter is liable.

Sir Robert Howard's Caſe. 2 Salkeld. 625. 2 Ld. Raymond 480. S. C.

Although from a peruſal of the note below, it will appear that no difficulty could occur on ſuch a point at the preſent day; yet it is uſual, in order to prevent diſputes, to inſert in the modern policies "*the firſt and laſt days included.*

Vide the Appendix. No 3.

* Policies on lives are equally vitiated by fraud or falſhood, as thoſe on marine inſurances; becauſe they are equally contracts of good faith, in which the underwriter, from neceſſity, muſt rely upon the integrity of the inſured for the ſtatement of circumſtances. Indeed, the caſe of *Wittingham* v. *Thornborough*, which we took occaſion to cite in ſupport of the doctrine laid down in the chapter upon Fraud in Marine Inſurances, was a policy upon a life inſurance.—In another caſe, the principles of fraud were conſidered as far as it affects this contract.

* P. 437

V. ante p. 216.

Stackpole v. Simon. Sittings at Guildhall. Hilary Vac. 1779.

It was an action on a policy of inſurance for 150*l.* at four guineas *per cent.* in caſe *Drury Sheppey* ſhould die at any time between the 1ſt of *April* 1777, and the 1ſt of *April* 1778, both days

(*a*) In the law books, not perhaps much to the honour of the profeſſion, this diſtinction taken by my Lord *Holt*, was at one time held to be law, at others not; ſometimes, thoſe expreſſions were held to mean the ſame thing; at others to be quite different. In the year 1777, however, this glaring abſurdity was entirely done away, and the Court of King's Bench unanimouſly held, after much deliberation, that they mean the ſame thing; that they ſhall either be excluſive or incluſive, according to the context and ſubject matter, and ſhall be ſo conſtrued as moſt effectually to ſupport the deeds of the parties, and not to deſtroy them. See Lord *Mansfield's* very elaborate argument upon this occaſion, in which all the caſes are fully ſtated and conſidered.. *Pugh* v. the Duke of *Leeds*. *Cowper's* Reports 714.

days included, and during the life time of *John Sheppey*, the father of *Drury:* but in case the said *John* should die before the said *Drury*, the policy to be void; the question was, as to the representation of the life at the time of the insurance. The interest in the insurance was 900*l.* due from *Drury Sheppey* to the plaintiff. It was admitted, that the life expired within the time limited in the policy. *Drury Sheppey* had a place in the Custom-house of *Ireland*, and was in bad circumstances. He went to the South of *France* for the benefit of his health, or to avoid his creditors, and there died. The broker, who effected the policy, told the underwriters that the gentleman, for whom he acted, would not warrant, but from the account he (the broker) had received, *he believed it to be a good life.*

Lord *Mansfield.*—As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first; and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from *information.* There is no fraud in him. There was a verdict for the plaintiff.

Even where there is an express warranty, that the person is in good health, it is sufficient that he is in a reasonable, good * state of health; for it never can mean, that the *cestui qui vie* is perfectly free from the seeds of disorder. Nay, even if the person, whose life was insured, laboured under a particular infirmity, if it can be proved by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with; and the insurer is liable. * P. 438

Thus in an action on a policy made on the life of Sir *James Ross* for one year from *October* 1759 to *October* 1760, *warranted in good health at the time of making the policy*; the fact was, that Sir *James* had received a wound at the battle of *La Feldt* in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *fæces*, and which was not mentioned to the insurer. Sir *James* died of a malignant fever within the time of the insurance All the physicians and surgeons, who were examined for the plaintiff, swore that the wound had no sort of connexion with the fever; and that the want of retention was not a disorder, which shortened life, but he might, notwithstanding that, have lived to the common age of man: and the surgeons, who opened him, said, that his intestines were all sound. There was one physician examined for the defendant, who said, the want of retention was paralytick; but being asked to explain, he said, it was only a local palsy, Ross v. Bradshaw. 1. Blackst. Rep. 312.

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palſy, ariſing from the wound, but did not affect life: but on the whole he did not look upon him as a good life

Lord *Mansfield*.—The queſtion of fraud cannot exiſt in this caſe. When a man makes inſurance upon a life generally without any repreſentation of the ſtate of the life inſured, the inſurers take all the riſk, unleſs there was ſome fraud in the perſon inſuring, either by his ſuppreſſing ſome circumſtances, which he knew, or by alledging what was falſe. But if the perſon inſuring knew no more than the inſurer, the latter takes the riſk. In this caſe there is a warranty, and wherever that is the caſe, it muſt at all events be proved, that the party was a good life, which makes the queſtion on a warranty much larger than that on fraud. Here it is proved that there was no repreſentation at all, as to the ſtate of life, nor any queſtion aſked about it: nor was it neceſſary. Where an inſurance is upon a repreſentation, every material circumſtance ſhould be mentioned, ſuch as age, way of life, &c. But where there is a warranty, * then nothing need be told; but it muſt in general be proved, if litigated, *that the life was, in fact, a good one, and ſo it may be, though he have a particular infirmity.* The only queſtion is, *whether he was in a reaſonable good ſtate of health and ſuch a life as ought to be inſured on common terms* The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

• P. 439

Willis v. Poole. Sittings at Guildhall. Eaſter Vac. 1780.

In a ſubſequent caſe, the ſame rule of deciſion was recommended and enforced. It was an action on a policy on the life of Sir *Simeon Stuart*, Bart. from the 1ſt of *April* 1779 to the 1ſt of *April* 1780, and during the life of *Eliza Edgley Ewer*. This policy contained a warranty that Sir *Simeon* was about 57 years of age, *and in good health on the 11th of May* 1779, and that Mrs. *Ewer* was about 78 years of age. The defendant at the trial admitted, that Sir *Simeon* and Mrs. *Ewer* were of the reſpective ages mentioned in the warranty; that he died before the 1ſt of *April* 1780, and that ſhe was living. Two queſtions were intended to have been made; 1ſt, As to the plaintiff's intereſt: 2d, On the warranty of health. The former was diſpoſed of, by the plaintiff having proved a judgment debt. As to the latter, it appeared in evidence, that, although Sir *Simeon* was troubled with ſpaſms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was alſo proved by the broker, who effected the policy, that the underwriters were told, that Sir *Simeon* was ſubject to the gout. Dr. *Heberden* and other gentlemen of the faculty were examined, who proved that ſpaſms and convulſions were ſymptoms incident to the gout.

Lord *Mansfield*. The imperfection of language is ſuch, that we have not words for every different idea; and the real intention

tion of parties muſt be found out by the ſubject matter. By the preſent policy, the life is warranted, to ſome of the underwriters *in health*, to others *in good health*; and yet there was no difference intended in point of fact. *Such a warranty can never mean that a man has not the ſeeds of a diſorder.* We are all born with the ſeeds of mortality in us. A man, ſubject to the gout, is a life capable of being inſured, if he has no ſickneſs * at the time to make it an unequal contract. There was a verdict for the plaintiff.

* P. 440

In a former chapter we ſaw, that when the riſk is entire, and it is once begun, there ſhall be no apportionment or return of premium, though it ſhould ceaſe the very next day after it commenced. The ſame rule is applicable in every reſpect to the premium on life inſurances; for the contract is entire, and if the perſon whoſe life is inſured, ſhould put an end to it the next day, after the riſk commences, though the underwriter is diſcharged, there would be no return of premium. This has never been decided in any judicial determination expreſsly on the point, but it has frequently been declared to be the law upon the ſubject by the learned judges in the courſe of argument, when return of premium on marine inſurances was the point under diſcuſſion. This was particularly done in the caſe of *Tyrie* v. *Fletcher*, by Lord *Manſfield*, when delivering the judgment of the court. "There has been an inſtance put," ſaid his Lordſhip, "of a "policy where the meaſure is by time, which ſeems to me to "be very ſtrong and appoſite to the preſent caſe; and that is "an inſurance upon a man's life for twelve months. There "can be no doubt but the riſk there is conſtituted by the mea"ſure of time, and depends entirely upon it: for the under"writer would demand double the premium for *two* years, "that he would take to inſure the ſame life for one year only. "In ſuch policies, there is a general exception againſt ſuicide. "If the perſon puts an end to his own life the next day, or a "month after, or at any other period within the twelve months, "there never was an idea in any man's breaſt, that part of the "premium ſhould be returned."

Vide aſtte ch. 19.

Cowper. 669.

Afterwards in the caſe of *Bermon* v. *Woodbridge*. Lord *Manſfield* laid down the ſame doctrine. "In an inſurance upon a "life with the common exception of ſuicide, and the hands of "juſtice, if the party is executed, or commit ſuicide, in twenty "four hours, there ſhall be no return."

Douglas 758.

From theſe opinions which have been frequently repeated in other caſes, the law upon the ſubject of return of premium, as applicable to life inſurances, ſeems perfectly aſcertained; becauſe except in the caſe of ſuicide or a publick execution, the queſtion can never ariſe.

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*CHAPTER THE TWENTY-THIRD.

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Of Insurance againſt Fire

AN inſurance of this ſort is a contract, by which the inſurer, in conſideration of the premium, which he receives, undertakes to indemnify the inſured, againſt all loſſes, which he may ſuſtain in his houſe, or goods, by means of fire, within the time limited in the policy. To enter upon a detail of the various advantages, which mankind have derived from this ſpecies of contract, would be a waſte of time; becauſe they are obvious to every underſtanding. As little does it fall within the compaſs of my plan, to enumerate the various offices that have been inſtituted for the purpoſe of inſuring property againſt fire; or the rules and regulations, by which they are ſeverally governed. Some of them have been inſtituted by royal charter; others by deed enrolled; and others give ſecurity upon land for the payment of loſſes. The rules, by which theſe ſocieties are governed, are eſtabliſhed by their own managers, and a copy given to every perſon at the time he inſures; ſo that, by his acquieſcence, he ſubmits to their propoſals, and is fully apprized of thoſe rules, upon the compliance or non-compliance with which, he will, or will not be entitled to an indemnity.

The conſtruction to be put upon thoſe regulations, has but ſeldom become the ſubject of judicial enquiry; two inſtances only have occurred in our reſearches upon this occaſion. In the propoſals of the *London* Aſſurance Company, and ſome of the other offices, there is a clauſe by which it is provided, that they do not hold themſelves liable for any loſs or damage by fire, happening by any invaſion, foreign enemy, *or any military or uſurped power* whatſoever. It became a queſtion, what ſpecies of inſurrection ſhould be deemed a military or uſurped power within the meaning of this proviſo. It was held by the court of Common Pleas, againſt the opinion of Mr. Juſtice *Gould*, that

* P. 442 * it could only mean to extend to houſes ſet on fire by means of an invaſion from abroad, or of an internal rebellion, when armies are employed to ſupport it.

Drinkwater v. the Corporation of the London Aſſurance 2 Wilſon 363.

The caſe in which this queſtion aroſe, was an action of covenant againſt the defendants upon a Policy of Inſurance of a malting office of the plaintiff's at *Norwich* from fire, in which policy there was a proviſo that the corporation ſhould not be liable in caſe the ſame ſhould be burnt by any invaſion by foreign enemies, or any military or uſurped power whatſoever, and that the defendants had not kept their covenants, to the plaintiff's damage.

damage. The defendants plead firſt the general iſſue, that they have not broke their covenants, and thereupon iſſue is joined. 2dly. They plead that it was burnt by an *uſurped power*: the plaintiff replies, that it was not burnt by an *uſurped power*, and thereupon iſſue is alſo joined. This cauſe was tried at *Norwich* aſſizes; a verdict was given for the plaintiff, and 469*l.* damages, ſubject to the opinion of the court, upon the following caſe, viz. That upon *Saturday* the 27th of *November*, a mob aroſe at *Norwich* upon account of the high price of proviſions, and ſpoiled and deſtroyed divers quantities of flour; thereupon the proclamation was read, and the mob diſperſed for that time. Afterwards another mob aroſe, and burnt down the malting office in the policy mentioned. The queſtion is, whether the plaintiff is entitled to recover in this action. This caſe was twice argued at the bar, and the court took time to deliberate; after which, as the judges differed in opinion, they delivered their opinions *ſeriatim*.

Mr. Juſtice *Gould* was of opinion, that the malting office being burnt by the mob, who roſe to reduce the price of proviſions, the ſame was burnt by an *uſurped power*, within the true intent and meaning of the proviſo in the policy: to ſhew that it was an uſurped power for any perſons to aſſemble themſelves, to alter the laws, to ſet a price upon victuals, &c. he cited *Popham* 122, where it is agreed by the juſtices, that to attempt ſuch a thing by force is felony, if not treaſon; and therefore judgment ought to be for the defendant.

Mr. Juſtice *Bathurſt*. The words "*uſurped power*," in the proviſo according to the true import thereof, and the * meaning of the parties, can only mean an invaſion of the kingdom by foreign enemies to give laws and uſurp the government thereof, or an internal armed force in rebellion, aſſuming the power of government by making laws, and puniſhing, for not obeying thoſe laws. The plea alledges that the malting office was burnt by *an uſurped power* unlawfully exerciſed but does not charge *that* uſurped power as a rebellion, that a mob roſe at *Norwich* on account of the price of victuals, and as ſoon as the proclamation was read, they diſperſed; therefore judgment ought to be for the plaintiff. * P. 443

Mr. Juſtice *Clive*. The words muſt mean ſuch an uſurped power as amounts to high-treaſon, which is ſettled by the 25th of *Edward* Third. The offence of the mob in the preſent caſe was a felonious riot, for which the offenders might have ſuffered; but it cannot be ſaid to be an uſurped power; therefore I am of opinion that judgment ſhould be given for the plaintiff.

Lord Chief Juſtice *Wilmot*. Upon the beſt conſideration I am able to give this caſe, I am of opinion, that the burning of the malting office, was not a burning by an *uſurped power* within

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the meaning of the proviſo. Policies of Inſurance, like all other contracts, muſt be conſtrued according to the true intention of the parties. Although the counſel on one ſide ſaid, that policies ought to be conſtrued liberally; on the other ſide, that they ought to be conſtrued ſtrictly; in a doubtful caſe I think the turn of the ſcale ought to be given againſt the ſpeaker, becauſe he has not fully and clearly explained himſelf. The imperfection of language to expreſs our ideas is the occaſion that words have equivocal meanings, and it is often very uncertain what the parties to a contract in writing mean. When the ideas are ſimple, words expreſs them clearly; but when they are complex, difficulties often ariſe; and men differ much about the ideas intended to be conveyed by words. In the preſent caſe, what is the true idea conveyed to the mind by the words *uſurped power?* The rule to find it out is to conſider the words of the context, and to attend to the popular uſe of the words, according to *Horace*, *Arbitrium eſt, et jus, et norma loquendi*. My idea of the words, *burnt by an uſurped power*, from the context is, that they mean burnt, * or ſet on fire by occaſion of an invaſion from abroad, or of an internal rebellion, when armies are employed to ſupport it, when the laws are dormant and ſilent, and firing of towns are unavoidable; theſe are the outlines of the picture drawn by the idea, which theſe words convey to my mind. The time of the incorporation of this ſociety of the *London* Aſſurance Company, was ſoon after a rebellion in this kingdom, and it was not ſo romantic a thing to guard againſt fire by rebellion, as it might be now; the time therefore, is an argument with me that this is the meaning of theſe words. Rebellious mobs may be alſo meant to be guarded againſt by the proviſo, becauſe this corporation commenced ſoon after the riot act; and if common mobs had been in their minds, they would have made uſe of the word *mob*. The words "*uſurped power*," may have a great variety of meanings according to the ſubject matter where they are uſed, and it would be pedantic to define the words in their various meanings; but in the preſent caſe, they cannot mean the power uſed by a common mob. It has not been ſaid, that if one, or fifty perſons had wickedly ſet this houſe on fire, that it would be within the meaning of the words *uſurped power*. It has been objected that here was an *uſurped power* to reduce the price of victuals, but this is part of the power of the crown; and therefore it was an *uſurped power*: but the king has no power to reduce the price of victuals. The difference between a rebellious mob and a common mob is, that the firſt is high treaſon; the latter a riot or a felony. Whether was this a common or a rebellious mob? The firſt time the mob riſes, the magiſtrates read the proclamation, and the mob diſperſe, they hear the law and immediatel

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mediately obey it. The next day another mob riſes on the ſame account, and damages the houſes of two bakers; thirty people in fifteen minutes put this army to flight, they were diſperſed and heard of no more. Where are the *ſpecies belli* which Lord *Hale* deſcribes? This mob wants an univerſality of purpoſe to deſtroy, to make it a rebellious mob, or high treaſon. 1 *Hale's*, P. C. 135. There muſt be an univerſality, a purpoſe to deſtroy *all* houſes, *all* incloſures, *all* bawdy houſes, &c. Here they fell upon two bakers and a miller, and the mob chaſtized theſe particular perſons to abate the price of proviſions in a particular place: this does not amount to a rebellious mob. When the laws are executed with ſpirit, mobs are eaſily quelled; ſometimes a courageous act done by a ſingle perſon, will quell and diſperſe a mob. And ſometimes the wiſdom of an individual will do the ſame, as is thus beautifully deſcribed by *Virgil*. * P. 445

Ac veluti magno in populo cum ſæpe coorta eſt
Seditio, ſævitque animis ignobile vulgus,
Jamque faces et ſaxa volant: furor arma miniſtrat.
Tum pietate gravem, ac meritis, ſi forte virum quem
Conſpexere, ſilent, arrectiſque auribus adſtant:
Ille regit dictis animos, et pectora mulcet.

But amongſt armies, great guns and bombs, the laws are ſilenced, and the wiſdom, or courage of an individual will ſignify nothing. Upon the whole, I am of opinion, that there muſt be judgment for the plaintiff; and accordingly the *poſtea* was ordered to be delivered to the plaintiff, by three judges againſt one.

The Sun Fire Office has uſed words of a larger and more extenſive import than thoſe, which were the ſubject of diſcuſſion in the laſt caſe; for the proprietors of that company declare, that they will not pay any loſs or damage by fire happening by any invaſion, foreign enemy, *civil commotion*, or any military or uſurped power whatever. A caſe has *unfortunately* ariſen, in which the meaning of theſe words, *civil commotion*, has been the ſubject of judicial enquiry.

Langdale v. Maſon and Others. Sittings at Guildhall. Mich. Vac. 1780.

An action was brought on a policy of inſurance to recover from the Sun Fire Office a ſatisfaction for damage done to the plaintiff's houſes and goods by the rioters, who, it is very well known, and hiſtory will inform poſterity, in *June*, 1780, to the terror and diſmay of the inhabitants of *London*, traverſed that city for ſeveral days, burning and deſtroying *Roman Catholick* chapels, publick priſons, and the houſes of various individuals; the oſtenſible purpoſe of their aſſembling being to procure the repeal of a wiſe and humane law (which had paſſed for ſome indulgences to *Roman Catholicks*) and who were at laſt only diſperſed by military force. As the circumſtances of theſe riots were very recent, they were not minutely gone into

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at the trial. It was, however, ſufficiently proved, that the * plaintiff, on account of his religion, (being a *Catholick*) had been, amongſt others, ſelected as an object of the rage of the times, and that his houſes and effects were ſet on fire. The office defended this action, conſidering that they were protected by the article juſt recited, namely, "That they would "not anſwer for any loſs, occaſioned by an invaſion, foreign "enemy, *civil commotion*, or any military or uſurped power "whatever." This point was argued much at length by the counſel on both ſides.

* P. 446

Lord *Mansfield*.—Gentlemen of the jury, this is an action brought by the plaintiff againſt the defendants upon the policy of inſurance mentioned in the pleadings for the value of property, which was conſumed by fire. Moſt undoubtedly every man's leaning muſt be to the ſide of the plaintiff, in order to divide the loſs in ſo great a calamity. But that leaning muſt be governed by rules of law and juſtice: and the only queſtion, that ariſes for your determination and that of the court, is ſingly upon the conſtruction of two words in the policy. It will be neceſſary, in order to inveſtigate this matter, to go into the hiſtory, which has been opened and explained to you, of other inſurance policies. In the year 1720, the *London* Aſſurance Company put into their policies all the words here uſed, except *civil commotion*. Whatever fire happens by a foreign enemy is clearly provided againſt: when they burn houſes, or ſet fire to a town, that is alſo provided for. What is meant by military or uſurped power? They are ambiguous; and they ſeem to have been the ſubject of a queſtion and determination. They muſt mean rebellion, where the fire is made by authority: as in the year 1745, the rebels came to *Derby*, and if they had ordered any part of the town, or a ſingle houſe to be ſet on fire that would have been by authority of a rebellion That is the only diſtinction in the caſe—it muſt be by rebellion got to ſuch a head, as to be under authority. In the year 1726, ſome years after the *London* Aſſurance Company had done it, the Sun Fire Office put in the exception; and in 1727, they put in other words: they do not keep to the form of the *London* Aſſurance: they do not ſay by invaſion from foreign enemies merely; they clearly provide againſt rebellion, determined rebellion, with generals who could give orders. Though this be ſo guarded, the Sun Fire Office did not think it anſwered their purpoſe; and therefore they took the words *civil commotion*. Not only uſing thoſe words, applicable to guard againſt a foreign enemy, againſt a rebellion, where there are officers and leaders, that can give authority and power: but they add other words as general and untechnical as can poſſibly be uſed: *civil commotion*, not civil commotion that amounts to *high treaſon*. They avoid ſaying civil commotions that amount to felony:

Vide ſupra.

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ny: they avoid saying civil commotions that amount to *misdemeanors*: but they use a general expression "if the mischief happens from a civil commotion," taking the largest and most general sense of the words that the language will allow: they do not even say a *riot*. It may be a question in point of law, whether an assembly or multitude be a riot. In that case, they do not say committing a felony, but speak of fire occasioned by civil commotion. The single question is, whether this has been a civil commotion. If there be a case, to which these words can be applicable, it is to a case of this sort. I cannot see any of the other words, to which it can be applied. Usurped power takes in rebellion, acting by usurped powers amongst themselves. From a foreign enemy the office is secured. But what is a civil commotion? it is something else. The present was an insurrection of the people resisting all law, setting the protection of the government at nought, taking from every man, who was the object of their resentment, that protection, as appears from the evidence given by the witnesses upon the facts, and which you all know as well as if no witnesses had been produced. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time, and the very same night; the mob were in *Broad-street*, *St. Catherine's* in *Colman-street*, *at Blackfriar's Bridge*, and at the plaintiff's. What is the object? *General destruction*, *general confusion*. *It certainly was meant to aim at the very vitals of the constitution*. It was not a private matter, under the colour of *popery* only, to destroy all Papists under a pretence or a cry of *No popery*. But the general object was *destruction* and *confusion*. The Fleet Prison was burnt down: Newgate was burnt down the night before. The King's Bench Prison is burnt, and all the prisoners set at liberty. The new Bridewell is burnt; the Bank attacked; consider the consequences, if they had succeeded in destroying the Bank of *England*. The Excise and Pay Offices in *Broad-street* were threatened. Military resistance, and an extraordinary stretch were made and justified by necessity. There was a great deal of firing, many men were killed; and the houses of a vast number of papists were burnt and destroyed. What is this but a *civil* commotion? No definition has been attempted to be given of what it is. It is said, that this is a civil commotion distinct from usurped power and rebellion. It is admitted, that this kind of insurrection may amount to high treason: and, to be sure, it may. But the office do not put their expectation upon trying, whether they were guilty of high treason or not. There is no manner of doubt, that this was an insurrection for a grand purpose, to take from a set of men the protection of the law. That is levying war against the king: there is not any doubt of it. It is not put upon that,

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but on the ground of a civil commotion. It is not an occasional riot, that would be another queſtion. I do not give any opinion what that might be. You will give your opinions, whether the facts of this caſe bring it within the idea of a civil commotion. I think a civil commotion is this; an inſurrection of the people for general purpoſes, though it may not amount to a rebellion, where there is an uſurped power. If you think it was ſuch an inſurrection of the people for the purpoſes of general miſchief though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiff. The jury, agreeably to the Chief Juſtice's direction, found for the defendants.

See the printed propoſals of the different Fire Offices.

When a fire happens, and the party ſuſtains a loſs in conſequence of it, he is bound by the printed propoſals of moſt of the ſocieties to give immediate notice thereof to the office in which he is inſured; and as ſoon as poſſible afterwards, or within a limited time according to the regulations of ſome, to deliver in as particular an account of his loſs, or damage, as the nature of the caſe will admit; and make proof of the ſame by his oath or affirmation, by books of accounts, or ſuch other vouchers as ſhall be required, or as ſhall be in exiſtence. It is alſo neceſſary that the inſured ſhould procure a certificate under the hands of the miniſter and churchwardens, together with ſome other reputable inhabitants of the pariſh, not concerned in ſuch loſs, importing, that they are well acquainted with the character and circumſtances of the ſufferer or ſufferers: and do know, or verily believe, that he, ſhe, or they, have really, and by misfortune ſuſtained by ſuch fire the loſs and damage therein mentioned. When any loſs is ſettled and adjuſted, the ſufferers are to receive immediate ſatisfaction, without any deduction.

* P. 449

Beawes 4th edit. p. 294.

Vide p. 434.

In the *Lex Mercatoria* it is ſaid, that policies on houſes and lives admit of no *average*. That this is true of the latter cannot be denied, as we have already ſhewn in the preceding chapter; becauſe the payment of the whole ſum depends upon one ſingle event, which muſt *wholly* happen or not at all. But that it cannot be true of inſurances againſt fire, either of houſes or goods is equally clear; for houſes may be *partially* damaged, and goods may be *partially* deſtroyed. In which caſe, as inſurance is a contract of indemnity, the end of the contract is anſwered by putting the party in the ſame ſituation, in which he was before the accident happened. But if he were to recover the whole ſum inſured, he would be in a better ſituation, which the law will not allow. Indeed from the above quotation from the printed propoſals it is evident that the offices conſider themſelves liable for partial loſſes. Nay, ſome of them, if not all, expreſsly

(*a*) expreſsly undertake to allow all reaſonable charges, attending the removal of goods, in caſes of fire, and to pay the ſufferer's, loſs, whether the goods are deſtroyed, loſt, or damaged by ſuch removal.

(*a*) Royal Exchange Aſſurance Company. Sun Fire Office. &c.

Theſe policies of inſurance are not, in their nature, aſſignable for they are only contracts to make good the loſs, which the contracting party himſelf ſhall ſuſtain; nor can the intereſt in them be transferred from one perſon to another without the conſent of the office. (*a*) There is a caſe in which, by the propoſals, theſe policies are allowed to be transferred, and that is, when any perſon dies, the policy and intereſt therein ſhall continue to the heir, executor, or adminiſtrator, reſpectively, to whom the property inſured ſhall belong; provided, before any new payment be made, ſuch heir, executor, or adminiſtrator, do procure his or her right, to be indorſed on the policy at the ſaid office, or the premium he paid in the name of the ſaid heir, executor, or adminiſtrator. But in all other caſes there can be no aſſignment; and the party claiming an indemnity muſt have an intereſt in the thing inſured at the time of the loſs. Theſe points were decided in two cauſes, one before Lord Chancellor *King*, and the other before Lord *Hardwicke*.

* P. 450

Lynch and Another v. Dalzell and Others. 3 Brown's Parl. Caſes, 497.

On the 28th of *July* 1721, one *Richard Ireland* took out from the Sun Fire office, a policy of inſurance, whereby it was witneſſed, that whereas the ſaid *Ireland* had agreed to pay, or cauſe to be paid to the ſaid office the ſum of five ſhillings within fifteen days after every quarter day, for the inſurance of his houſe, being the *Angel* Inn at *Graveſend*, with his goods and merchandize as therein after expreſſed only, and not elſewhere, *viz.* the dwelling houſe not exceeding 400*l.* and for the goods in the ſame only, not exceeding 500*l.*; and for the ſtable only, not exceeding 100*l.* all then occupied by *James Peck*, from loſs and damage by fire: and ſo long as the ſaid *Richard Ireland* ſhould duly pay or cauſe to be paid five ſhillings a quarter, as therein mentioned, the ſaid ſociety did bind themſelves, their heirs, executors, adminiſtrators and aſſigns, to pay and ſatisfy the ſaid *Ireland*, his executors, adminiſtrators and aſſigns, within fifteen days after every quarter day, in which he ſhould ſuffer by fire, his loſs not exceeding 1000*l.* according to the exact tenor of their printed propoſals. The policy was ſubſcribed the 28th of *July* 1721, by three of the Truſtees of the ſociety. Some conſiderable time afterwards, *Richard Ireland* died, having made his will, and *Anthony* his ſon ſole executor; who brought the policy to the office, and had an indorſment made thereon, that the ſame then belonged to him: and afterwards, namely, at or about *Chriſtmas* 1726, he, the ſaid *Anthony*, paid

(*a*) But in marine inſurances, the policy may be transferred. Delany v. Stoddart. 1 Term R. 26.

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the office a premium of twenty ſhillings for one year's inſurance, from *Chriſtmas* 1726, to *Chriſtmas* 1727, as by an article in the propoſals, he was at liberty to do. On the 24th of *Auguſt* 1727, a fire happened at *Graveſend*, which, among others, deſtroyed the houſe mentioned in the policy; and ſome time afterwards the appellants applied to the office, and alleged, that they had purchaſed the houſe and goods of *Anthony Ireland*; that the ſame were their property at the time of the fire, and that they had an aſſignment of the policy made to them, at the ſame * P. 451 * time, that the houſe and goods were aſſigned; and they produced an affidavit made by the appellant, *Roger Lynch*, in which he ſwore, that his loſs and damage by burning the ſaid houſe amounted, at a moderate computation, to 500*l.* and upwards; and upon this affidavit, was indorſed a certificate of the miniſter, churchwardens, and other inhabitants of *Graveſend*, that they verily believed, according to the beſt of their information, the appellants had ſuſtained a loſs of 500*l.* and upwards. But neither in the affidavit or certificate, was any mention made of any loſs being ſuſtained by the appellants by the burning of any goods in the ſaid houſe; nor was any affidavit made by *Anthony Ireland*, in whom the property of the policy was, that he had ſuffered any loſs. The appellants, however, inſiſted that the office ſhould pay them 1000*l.* for their loſs ſuſtained by the burning of the houſe and goods: and they accordingly filed a bill in Chancery, ſetting forth, that *Anthony Ireland* agreed to ſell and aſſign to the appellants the houſe, ſtables and goods, and alſo at the ſame time agreed to aſſign the policy; and that by indenture of the 24th of *June* 1727, for 250*l.* *Ireland* did aſſign to the appellants a leaſe he had of the houſe and ſtables for the reſidue of a term of 70 years, which commenced at *Midſummer*, 16 *Car.* 2.; but the goods, for which the appellants, as they alleged, were to pay 500*l.* being intended for one *Thomas Church*, who was to hold the inn under the appellants, *Ireland*, by deed poll of the ſame date, ſold the ſame to *Church* for his own uſe. The bill alſo ſtated, that by another writing of equal date, *Ireland* aſſigned the policy, and all money and benefit thereof to the appellants. That although the bill of ſale of the houſhold goods was made to *Church*; yet, as the appellants paid the purchaſe money for the ſame, *Church* aſſigned his bill of ſale to them, for ſecuring the money they had paid for the goods; and afterwards, by another writing, releaſed to the appellants his benefit and intereſt in the policy. The bill prayed ſatisfaction.

The reſpondents put in their anſwer, in which they ſet forth the nature and method of the inſurances made by the office, and admitted the policy in queſtion, and the appellants application for 1000*l.* loſs: but ſaid, that the affidavit produced, was not * P. 452 * agreeable to the propoſals; and that they had been informed and believed, that no aſſignment of the policy was made to the appellants,

appellants, nor any aſſignment of goods made to them by *Church*, till after the fire. They inſiſted, that the policies, iſſued by the office, were not, in their nature, aſſignable, the ſame being only contracts to make good the loſs, which the contracting party himſelf ſhould ſuſtain: and the policy in queſtion was firſt made to *Richard Ireland*, to pay *his* loſs, and was afterwards declared by indorſement to belong to *Anthony Ireland*; and that no other perſon was entitled to the benefit of it. The cauſe proceeded to iſſue, and witneſſes were examined on both ſides; and upon the appellants own evidence it appeared, that the firſt diſcourſe between the appellants and Mr. *Ireland* about the policy, was after the execution of the aſſignment of the houſe; and that the agreement (if there was any) about the policy was not, at the time when the appellants agreed to purchaſe *Ireland*'s term in the houſe. It appeared further, that the aſſignment of the policy, though bearing date *before*, was not made and executed till ſome time *after* the fire; ſo that the agreement for aſſigning the policy was a voluntary conceſſion of *Ireland* without any conſideration, and independent of the bargain for the houſe, and never made till after *Ireland*'s intereſt in the policy, as to the houſe, was determined, by his ſelling his intereſt in the thing inſured, and not carried into execution till the thing was loſt. As to the appellants property in the goods, they proved an aſſignment from *Church* to them, as a ſecurity for 300*l.* but omitted, in their interrogatories, the material queſtion, *when this aſſignment was made*: though the reſpondents by their anſwer, put the time plainly in iſſue, by inſiſting, that it was after the fire; and it did not appear that the appellants ever had any property in the goods. The reſpondents on their part proved, that the office did not inſure any perſons longer than they continued their property in the thing inſured: and that perſons dealing with them might not be miſtaken, ſuch notice was uſually given.

Lord Chancellor *King*.—Theſe policies are not inſurances of the ſpecifick things mentioned to be inſured; nor do ſuch inſurances attach on the realty, or in any manner go with the ſame as incident thereto, by any conveyance or aſſignment: * but they are only ſpecial agreements with the perſons inſuring, againſt ſuch loſs or damages as they may ſuſtain. The party inſuring muſt have a property at the time of the loſs, or he can ſuſtain no loſs; and conſequently can be entitled to no ſatisfaction. There was no contract ever made between the office and the appellants for any inſurance on the premiſes in queſtion. Not only the expreſs words, but the end and deſign of the contract with *Ireland* do, in caſe of any loſs, limit and reſtrain the ſatisfaction to ſuch loſs as ſhould be ſuſtained by *Richard Ireland* only; and the indorſement on the policy declared that right to his executor *Anthony Ireland* only. Theſe

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These policies are not in their nature assignable; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office. The transactions in the present case, by changing their property backwards and forwards, and rendering it uncertain whose the true property is, raise a suspicion, and fully justify the caution of the office, in preventing the assignment without consent of the managers, which method is pursued by all the insurance offices. Besides, the appellants' claim is at best founded only on an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened. His lordship therefore dismissed the bill.

Upon this decree there was an appeal to the House of Lords; and after hearing counsel on both sides, it was ORDERED AND ADJUDGED, that the same should be dismissed and the decree therein complained of affirmed.

A few years afterwards this case was cited with approbation by Lord *Hardwicke*, and relied upon by him as the ground of his opinion.

The Sadlers Company v. Badcock and Others. 2. Atkyn's, 554.

Anne Strode, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of *April* 1734, became a proprietor of the Hand-in-hand Office, by insuring the sum of 400*l.* on the house, for seven years, and on paying twelve shillings down, and three pounds some time after, the Company agreed, "to raise and pay, out of the effects of the contribution * P. 454, "* stock, the said sum of 400*l.* to her, and her executors, administrators, and assigns, so often as the house shall be burnt "down within the said term, unless the directors should build "the said house, and put it in as good plight as before the fire; "and on the back of the policy it was indorsed, that if this po- "licy should be assigned, the assignment must be entered with- "in twenty-one days after the making thereof." Mrs. *Strode*'s lease expired at *Midsummer* 1740, the house was not burnt down till the *January* after 1740, and she made an assignment of the policy to the plaintiffs the 23d of *February* after 1740. The question is, whether the plaintiffs, the assignees of Mrs. *Strode*, are entitled to the 400*l.* or to have the house built again; or whether the house being burnt down after Mrs. *Strode's* property ceased in it, the Company are obliged to make good the loss to her assignee of the policy. The Company made an order, subsequent in time to Mrs. *Strode's* policy in 1738, "That, where "as policies expire upon the property of the insured's ceasing, "if there is no application of the insured to assign, or to have "the loss made up, then the person having the property may "insure the said house in the said office, notwithstanding the "term for which the house was originally insured is expired."

There

There was evidence read for the plaintiffs to ſhew that they tendered the aſſignment to the defendants, to enter in their books, but they refuſed to accept of it.

Lord Chancellor *Hardwicke*.—During the progreſs of this cauſe, while the defendants ſeemed to depend chiefly upon the ſubſequent order, I was of opinion againſt them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three queſtions made in this cauſe. Firſt, whether this accident, which has happened, is ſuch a loſs, as obliges the defendants to make ſatisfaction to the plaintiffs. Secondly, Whether upon the terms of the original policy, the office is obliged to do it. Thirdly, which is rather conſequential of the former, whether the plaintiffs are properly aſſignees of Mrs. *Strode* under this policy. If this matter reſted ſingly upon the policy itſelf, I ſhould not think it ſuch a loſs, as would oblige the defendants to make ſatisfaction. Under this policy, the ſtate of the caſe is, Mrs. *Strode* was only a leſſee, her time expired at *Midſummer* 1740, the houſe * was burnt down in *January* after, *within the ſeven years*; the plaintiffs, the Sadlers Company, were ground landlords, and entitled to the reverſion of the term: upon the 23d of *February*, ſeven months after the expiration of the term, and one month after the fire, the aſſignment was made, and in conſideration of five ſhillings only; ſo that it muſt be taken as a voluntary aſſignment, as it ſtands before me. It has been inſiſted, on the part of the defendants, that the plaintiffs are not entitled to recover, as ſtanding in the place of Mrs. *Strode*, becauſe ſhe had no loſs or damage, her intereſt ceaſing before the fire happened. And this introduces the ſecond and third queſtions. I am of opinion, it is neceſſary the party inſured ſhould have an intereſt or property at the time of inſuring, and at the time the fire happens. It has been ſaid for the plaintiffs, that it is in nature of a wager laid by the inſurance company, and that it does not ſignify to whom they pay, if loſt. Now theſe inſurances from fire have been introduced in later times, and therefore differ from inſurance of ſhips, becauſe there *intereſt or no intereſt* is almoſt conſtantly inſerted, and if not inſerted (*a*) you cannot recover, unleſs you prove a property. By the firſt clauſe in the deed of contribution in 1696, the year this ſociety, called the *Hand in Hand Office*, incorporated themſelves, the ſociety are to make ſatisfaction in caſe of any loſs by fire. To whom, or for what loſs, are they to make ſatisfaction? Why, to the perſon inſured, and for the loſs he may have ſuſtained; for it cannot properly be called inſuring the thing, for there is no poſſibility of doing it, and therefore muſt mean inſuring the perſon

* P. 455

(*a*) This caſe was decided in the year 1743, previous to the paſſing of the ſtatute of 19 *Geo.* 2. ch. 37.

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perſon from damage. By the terms of the policy, the defendants might begin to build and repair within ſix days after the fire happens. It has been truly ſaid, this gives the ſociety an option to pay or rebuild, and ſhews moſt manifeſtly they meant to inſure upon the property of the inſured, becauſe nobody elſe can give them leave to lay even a brick; for another perſon might fancy a houſe of a different kind. Thus it ſtands upon the original agreement. The next queſtion will be, whether the ſubſequent order, made by the defendants in 1738, has made any alteration. I am of opinion it has not, for it was made only to explain a particular caſe in the policy: for it might have been a queſtion, whether Mrs. * *Strode* could have come before the expiration of the term, to examine the books of the office, and therefore this order was made to give her ſuch a power. It has been ſtrongly objected that the ſociety could not make ſuch an order. I am very tender of ſaying, whether they can or not. Becauſe, on one hand, it might be hard to ſay, that as a ſociety they cannot make any order for the good of the ſociety: on the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the intereſt of the inſured. The aſſignment is not at all within the terms of this order, becauſe it is plain, it meant an aſſignment before the loſs happened. Now, with regard to the loſs happening before the aſſignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the depoſit. It is plain ſhe thought ſo, for if ſhe had imagined ſhe had been entitled to 400*l.* would any friend have adviſed her to make a preſent of it to the plaintiff? The caſe of *Lynch* v. *Dalzell*, in the Houſe of Lords, ſhews how ſtrict this court and that houſe are, in the conſtruction of policies, to avoid frauds. The bill here muſt be diſmiſſed.

* P. 456

Vide ſupra.

In the body of the policy, the company acknowledge the receipt of the premium at the time of making the inſurance: and by the printed propoſals of the different ſocieties, it is expreſsly ſtipulated, that no inſurance ſhall take place, till the premium be actually paid by the inſured, his, her, or their agent or agents. This premium or conſideration money is in all the offices at the rate of two ſhillings *per cent.* for any ſum not exceeding 1000*l.* and two ſhillings and ſixpence from 1000*l.* upwards. But this muſt be underſtood to mean, the premium upon *common inſurances* only: for upon hazardous trades, and wooden buildings, &c the premium is proportioned to the riſk. Beſides this, by a late act of parliament a duty of one ſhilling and ſixpence *per annum* is laid upon every hundred pounds of property inſured from fire. This duty, however, is not to extend to inſurances upon publick hoſpitals.

22 Geo. 3. ch. 48. ſ. 1. Sect. 2.

Antech 19.

We have formerly ſeen, that whenever the riſk to be run was entire, there never was a return of premium, though the contract

tract ſhould ceaſe and determine the next day after its commencement. This rule applies to inſurances againſt fire, which generally are made for one entire and connected portion of time, * which cannot be ſevered: and therefore if the property inſured ſhould be deſtroyed by fire, ariſing from the act of a foreign enemy, the very day after the commencement of the policy, though the underwriter would be diſcharged; yet there can be no apportionment or return of premium.

* P. 457

In the firſt chapter of this work, we enumerated the various ſtamps neceſſary in order to render a policy upon fire effectual: to enforce which regulation, it has been declared by poſitive ſtatute, "That if any perſon ſhall ſign, ſeal, execute, or ſubſcribe any policy of inſurance from fire, not being duly ſtamped, he ſhall forfeit 10*l.* and in addition to the ſtamp duties impoſed by the various acts of parliament, ſhall pay to his majeſty the ſum of 5*l.* before any ſuch policy of inſurance ſhall be available in law or equity, or be given or received in evidence in any court of juſtice."

Vide ante p. 28.

17 Geo. 3. ch. 50. ſ. 24.

As the pureſt equity and good faith are eſſentially requiſite, as has been already ſhewn, to render the contract effectual when it relates to marine inſurances; ſo it need hardly be obſerved, that it is no leſs eſſential to the validity of the policy againſt fire: becauſe in the latter, as well as in the former, the inſurer, from the nature of the thing, is obliged, in a great meaſure, to rely upon the integrity and honeſty of the inſured, as to the repreſentation of the value and quantity of the property, which is the object of the inſurance.

Vide ante ch. 9.

* P. 458 * APPENDIX, No. I.

Policy of Inſurance on Ship or Goods.

In the Name of God, *Amen.*

as well in own Name, as for and in the Name and Names of all and every other Perſon or Perſons to whom the ſame doth, may, or ſhall appertain, in Part or in All doth make Aſſurance, and cauſe and them, and every of them to be inſured, loſt, or not loſt, at and from

Upon any Kind of Goods and Merchandizes, and alſo upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat, and other Furniture, of and in the good Ship or Veſſel called the whereof is Maſter, under God, for this preſent Voyage, or whoſoever elſe ſhall go for Maſter in the ſaid Ship, or by whatſoe er other Name or Names the ſame Ship, or the Maſter thereof, is or ſhall be named or called; beginning the Adventure upon the ſaid Goods and Merchandizes from the loading thereof aboard the ſaid Ship, upon the ſaid Ship, *&c.*

and ſo ſhall continue and endure, during her Abode there, upon the ſaid ſhip, *&c.* And farther, until the ſaid Ship, with all her Ordnance, Tackle, Apparel, *&c.* and Goods and Merchandizes whatſoever ſhall be arrived at upon the ſaid Ship, *&c.* until ſhe hath moored at Anchor, Twenty four Hours in good Safety; and upon the Goods and Merchandizes, until the ſame be there diſcharged and ſafely landed. And it ſhall be lawful for the ſaid Ship, *&c.* in this Voyage, to proceed and ſail to and touch and ſtay at any Ports and Places whatſoever without Prejudice to this Inſurance, the ſaid Ship, *&c.* Goods and Merchandizes, *&c.* for ſo much as concerns the Aſſureds, by Agreements between the Aſſureds and Aſſurers in this Policy are and ſhall be valued at

touching the Adventures and Perils which we the Aſſurers are contented to bear, and do take upon us in this
* P. 459 * Voyage, they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettiſons, Letters of Mart and Counter-mart, Surprizals, Takings at Sea, Arreſts, Reſtraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality ſoever; Barratry of the Maſter and Mariners,

ners, and of all other Perils, Loſſes and Misfortunes, that have or ſhall come to the Hurt, Detriment or Damage of the ſaid Goods and Merchandizes and Ship, &c. or any Part thereof. And in caſe of any Loſs or Misfortune, it ſhall be lawful to the Aſſureds, their Factors, Servants and Aſſigns, to ſue, labour and travel for, in and about the Defence, Safeguard and Recovery of the ſaid Goods and Merchandize and Ship, &c. or any Part thereof, without Prejudice to this Inſurance; that this Writing or Policy of Aſſurance ſhall be of as much Force and Effect as the ſureſt Writing or Policy of Aſſurance heretofore made in *Lombard-ſtreet*, or in the *Royal Exchange*, or elſewhere in *London*. And ſo we the Aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own Part, our Heirs, Executors and Goods, to the Aſſured, their Executors, Adminiſtrators, and Aſſigns, for the true Performance of the Premiſes, confeſſing ourſelves paid the Conſideration due unto us for this Aſſurance by the Aſſured

at and after the Rate of
per cent.

In Witneſs whereof we the Aſſurers have ſubſcribed our Names and Sums aſſured in *London*.

N. B. Corn, Fiſh, Salt, Fruit, Flour, and Seed, are warranted free from Average, unleſs general, or the Ship be ſtranded; Sugar, Tobacco, Flax, Hemp, Hides, and Skins, are warranted free from Average, under Five Pounds *per Cent.* And all other Goods, alſo the Ship, and Freight are warranted free from Average under Three *per Cent.* unleſs General, or the Ship be ſtranded.

*APPENDIX, No. II. *P. 460

Form of a Reſpondentia Bond.

KNOW all Men by theſe Preſents, That

held and firmly bound to

in the Sum, or Penalty of
of good and lawful Money of *Great-Britain*, to be paid to the ſaid
or to certain Attorney, Executors, Adminiſtrators, or Aſſigns; to which Payment, well and truly to be made Heirs, Executors, and Adminiſtrators, firmly by theſe Preſents, ſealed with

Seal.

Seal. Dated this Day of in the Year of the Reign of our Sovereign Lord by the Grace of God of *Great Britain*, *France* and *Ireland*, King, Defender of the Faith, and ſo forth, and in the Year of our Lord, One thouſand ſeven hundred and The Condition of the above-written Obligation is ſuch that whereas the above-named hath, on the Day of the Date above-written, lent unto the above-bound the Sum of upon the Merchandizes and Effects, to that Value laded, or to be laden on board the good Ship or Veſſel, called the of the Burthen of Tons or thereabouts, now in the River *Thames*, whereof is Commander. If the ſaid Ship or Veſſel do, and ſhall with all convenient Speed, proceed and ſail from, and out of the ſaid River of *Thames*, on a Voyage to any Ports or Places in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere beyond the *Cape of Good Hope*, and from thence, do, and ſhall ſail, and return unto the ſaid River of *Thames*, at, or before the End and Expiration of Thirty ſix Calendar Months, to be accounted from the Day of the Date above written, and that without Deviation (the Dangers and Caſualties of the Seas excepted). And if the above bound Heirs, Executors, or Adminiſtrators, do, and ſhall, within Days next after the ſaid Ship, or Veſſel, ſhall be arrived in the ſaid River of *Thames*, from the ſaid Voyage, or at the End and Expiration of the ſaid Thirty-ſix Calendar Months, to be accounted as aforeſaid (which of the ſaid Times ſhall firſt and next happen) well and truly pay, or cauſe to be paid, unto the above named Executors, Adminiſtrators, or Aſſigns, the Sum of of lawful Money of *Great Britain*, together with of like Money, by the Calendar Month, and ſo proportionably * P. 461 * for a greater or leſſer Time than a Calendar Month, for all ſuch Time, and ſo many Calendar Months, as ſhall be elapſed, and run out of the ſaid Thirty-ſix Calendar Months, over and above twenty Calendar Months, to be accounted from the Day of the Date above-written; or if in the ſaid Voyage, and within the ſaid Thirty ſix Calendar Months, to be accounted as aforeſaid, an utter Loſs of the ſaid Ship, or Veſſel, by Fire, Enemies, Men of War, or any other Caſualties ſhall unavoidably happen; and the above bound Heirs, Executors, or Adminiſtrators, do, and ſhall within Six Months next after the Loſs, pay and ſatisfy to the ſaid Executors, or Adminiſtrators, or Aſſigns, a juſt and proportional Average on all Goods and Effects which the ſaid carried from *England* on board the ſaid Ship or Veſſel, and on all other the Goods and Effects of the ſaid which ſhall acquire

acquire during the ſaid Voyage, and which ſhall not be unavoidably loſt: then the above written Obligation to be void, and of no Effect; or elſe to ſtand in full Force and Virtue.

Sealed and delivered (being firſt duly ſtampt) in the Preſence of } [J. S.]

APPENDIX, No. III.

Form of a Policy of Inſurance upon a Life.

In the Name of GOD, *Amen.*

do make Aſſurance, and cauſe to be aſſured upon natural Life aged for and during the Term and Space of Calendar Months, to commence this Day of in the Year of our Lord, One thouſand ſeven hundred and fully to be complete and ended. And it is declared, that this Aſſurance is made to and for the Uſe, Benefit, and Security of the ſaid Executors, Adminiſtrators, and Aſſigns, in caſe of the Death of the ſaid within the Time aforeſaid, which the above Governor and Company do allow to be good and ſufficient Ground and Inducement * for making this Aſſurance, and do agree that the Life of the ſaid is and ſhall be rated and valued at the Sum aſſured: The ſaid Governor and Company therefore, for and in Conſideration of *per Cent.* to them paid, do aſſure, aſſume, and promiſe that the ſaid ſhall, by the Permiſſion of Almighty God, live, and continue in this natural Life, for and during the ſaid Term and Space of Calendar Months, to commence as aforeſaid; or in Default thereof, that is to ſay, in caſe the ſaid ſhall in or during the ſaid Time, and before the full End and Expiration thereof, happen to die, or deceaſe out of this World by any Way or Means whatſoever, that then the above ſaid Governor and Company will well and truly ſatisfy, content, and pay unto the ſaid Executors, Adminiſtrators, or Aſſigns, the Sum or Sums of Money by them aſſured, and are here under-written, hereby promiſing and binding themſelves and their Succeſſors to the Aſſured, Executors, Adminiſtrators, or Aſſigns, for the true Performance of the Premiſes, confeſſing themſelves paid the Conſideration due unto them for this Aſſurance by the Aſſured. *Provided* always, and it is hereby

* P. 462

declared to be the true Intent and Meaning of this Assurance, and this Policy is accepted by the said upon condition that the same shall be utterly void and of no Effect, in case the said shall exceed the *Age* of or shall voluntarily go to *Sea* or into the *Wars*, by Sea or Land, without Licence in Writing first had or obtained for so doing, any Thing in these Presents to the contrary hereof in any wise notwithstanding. In witness whereof the said Governor and Company have caused their common Seal to be hereunto affixed, and the Sum or Sums by them assured to be here under-written, at their Office in *London*, this Day of in the Year of the Reign of our Sovereign Lord by the Grace of God, of *Great Britain*, *France*, and *Ireland*, King, Defender of the Faith, *&c.* and in the Year of our Lord, one thousand seven hundred and The said Governor and Company are content with this Assurance for £.

* P. 463 # *APPENDIX, No. IV.

Form of a Policy of Insurance against Fire.

BY the Corporation of the *Royal Exchange* Assurance of Houses and Goods from Fire

This present Instrument or policy of Assurance witnesseth, That whereas agreed to pay into the Treasury of the Corporation of the *Royal Exchange* Assurance, at their Office on the *Royal Exchange*, *London*, for the assurance of

from Loss or Damage by Fire. *Now know all Men by these Presents*, That the capital Stock, Estate, and Securities of the said Corporation shall be subject and liable to pay, make good, and satisfy unto the said Assured Heirs, Executors, or Administrators, any Loss or Damage which shall or may happen by Fire to the said Goods aforesaid (except such Goods as Hemp, Flax, Tallow, Pitch, Tar, Turpentine, Glass, China, and Earthen Wares, Writings, Books of Accounts, Notes, Bills, Bonds, Tallies, ready Money, Jewels, Plate, Pictures, Gun-powder, Hay, Straw, and Corn unthreshed, within the Space of twelve Calendar Months, from the Day of the Date of this Instrument or policy of Assurance, not exceeding the Sum of

and shall so continue, remain, and be subject and liable, as aforesaid, from Year to Year, to be computed from the

Day

Day of in every Year, for ſo long Time as the ſaid Aſſured ſhall well and truly pay, or cauſe to be paid the Sum of into the Treaſury of the ſaid Corporation, on or before Day of which ſhall be in each ſucceeding Year, and the ſaid Corporation ſhall agree thereto by accepting and receiving the ſame, which ſaid Loſs or Damage ſhall be paid in Money immediately after the ſame ſhall be ſettled and adjuſted, or otherwiſe if the ſaid Loſs or Damage ſhall not be adjuſted, ſettled, and paid within ſixty Days after Notice thereof ſhall be given to the ſaid Corporation, by the ſaid Aſſured, that then the ſaid Corporation, their Officers, Workmen, or Aſſigns, ſhall, at the Charge of the ſaid Corporation, at the End and Expiration of the ſaid ſixty Days, provide and ſupply the ſaid Aſſured with the like Quantity of Goods of the ſame Sort and Kind, and of equal Value and Goodneſs with thoſe burnt or damnified by Fire. *Provided always nevertheleſs*, and it is hereby declared to be the true Intent and * Meaning of this Deed or Policy, that the ſaid Stock, Eſtate, and * P. 464
Securities of the ſaid Corporation ſhall not be ſubject or liable to pay, or make good to the Aſſured any Loſs or Damage by Fire, which ſhall happen by any invaſion, Foreign Enemy, or any Military or uſurped Power whatſoever. *Provided alſo*, That this Deed or Policy ſhall not take place or be binding to the ſaid Corporation until the Premium for one Year is paid, or in caſe the ſaid Aſſured ſhall have already made, or ſhall hereafter make any other Aſſurance upon the goods aforeſaid, unleſs the ſame ſhall be allowed of and ſpecified upon the Back of this Policy: Or if the ſaid at the time when any ſuch Fire ſhall happen, ſhall be in the poſſeſſion of, or let to any Perſon who ſhall uſe or exerciſe therein the Trade of a Sugar-baker, Apothecary, Chymiſt, Colour-man, Diſtiller, Bread or Biſcuit-baker, Ship or Tallow-chandler, Stable-keeper, Inn-holder, or Malſter, or ſhall be made uſe of for the ſtowing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine, but that in all or any of the ſaid Caſes theſe Preſents, and every Clauſe, Article and Thing herein contained ſhall ceaſe, determine, and be utterly void and of none Effect, or otherwiſe ſhall remain in full Force and Virtue In Witneſs whereof the ſaid Corporation have cauſed their common Seal to be hereunto affixed, the Day of in the Year of the Reign of our Sovereign Lord by the Grace of God of *Great Britain*, *France*, and *Ireland*, King, Defender of the Faith *&c.* and in the Year of our Lord, One thouſand ſeven hundred

N. B. This Policy to be of no Force, if aſſigned, unleſs ſuch Aſſignment be allowed by any Entry thereof in the Books of the Company.

TABLE

OF

THE PRINCIPAL MATTERS.

Abandonment.

BEFORE a perſon inſured can demand from the underwriter a recompence for a total loſs, he muſt abandon to him whatever claims he may have to the property inſured. *Page* 82, 143

The time, within which ſuch an abandonment muſt be made, was not fixed in *England* till lately by any poſitive regulation or deciſion. 82, 172

Abandonment is as ancient as the contract of inſurance itſelf. 143

When an abandonment is made, it muſt be total, and not partial. 144

The inſured may in all caſes chuſe not to abandon: but he cannot at his pleaſure abandon, and thereby turn a partial into a total loſs. *ibid*

The inſured may abandon to the underwriter, and call upon him for a total loſs, if the damage exceed half the value; if the voyage be abſolutely loſt or not worth purſuing; if farther expence be neceſſary; or if the inſurer will not engage at all events to bear that expence, tho' it ſhould exceed the value, or fail of ſucceſs. 145, 152, 159

But he cannot abandon, unleſs at ſome period or other of the voyage, there has been a total loſs; and if neither the thing inſured, nor the voyage be loſt, and the damage does not amount to a moiety of the value, he ſhall not be allowed to abandon. *P.* 146, 164

A ſhip was taken by a *Spaniſh* privateer, retaken by an *Engliſh* privateer and carried into *Boſton* in *New England*, where, as no perſon appeared to give ſecurity for the ſalvage, ſhe was ſold; the recaptors had their moiety, and the overplus remaining in the hands of the officers of the court of Admiralty, the owners were entitled to abandon and to recover for a total loſs. 146

A ſhip was taken by the *French*, remained with them eight days, and was then retaken: the maſter, mates, and ſailors, except a landman and an apprentice, had been taken out and carried to *France*. Before the capture, the ſhip had been ſeparated from her convoy, and was ſo far diſabled by ſtorm as to be incapable of proceeding in her voyage without going into port to refit. Part of the cargo was thrown overboard in the ſtorm, and the reſt ſpoiled while the ſhip lay at *Milford Haven*. In actions upon two policies, one on the ſhip, and the other on the cargo, it was held that this was a total loſs, ſo as to entitle the owners to abandon. 148

A ſhip, bound from *Montſerrat* to *London*, was captured, and the captain,

captain, crew, rigging, and part of the cargo, which was ſugar, were taken away, She was retaken and carried into *New-York*, where the captain alſo arrived. Upon taking poſſeſſion he found, that part of the cargo, that was left, had been waſhed overboard; that 57 hogſheads of what remained were damaged, and that the ſhip was in ſuch a ſtate that ſhe could not be repaired, without unloading her entirely. The owners had no ſtorehouſes at *New-York*; nor were any ſailors to be had. The ſalvage came to forty hogſheads of ſugar; and if the ſhip had been repaired, it would have exceeded the freight by 100*l.* There was an embargo laid on all ſhips till *December*, and this ſhip was to have arrived in *London* in *July* preceding. The captain, upon the advice of his friends, ſold the cargo, and was paid for it: he agreed alſo to ſell the ſhip; but the perſon who contracted for it ran away, upon which the captain left her in a creek, and came to *England*. The owners of the ſhip had a right to abandon to the inſurers on the ſhip and freight. *Page* 152

The right to abandon muſt depend on the nature of the caſe at the time of the action brought, or at the time of the offer to abandon; and therefore if at the time advice is received of the loſs, it appears that the peril is over and the thing in ſafety, the inſured has no right to abandon. 146, 159

Thus in a caſe where there was a capture and recapture, and it was ſtated that at the time of the offer to abandon, the ſhip was ſafe in port, and had ſuſtained no damage, the court held that the inſured had no right to abandon. *Page* 157

But if the underwriter pay for a total loſs, and it afterwards turn out to be but partial, the inſured ſhall not be obliged to refund; but the inſurer ſhall ſtand in his place for the benefit of ſalvage. 164

A ſhip was inſured from *Wyburg* to *Lynn*, at which place ſhe arrived: the jury found that the ſhip was not worth repairing; but the damage ſuſtained in the voyage inſured did not exceed 48*l. per cent.* By the court, the jury have precluded us from ſaying this is a total loſs; and where neither the thing inſured nor the voyage is loſt, the inſured cannot abandon. *ibid*

Inſurance on ſhip, cargo and freight, at and from *Tortola* to *London*, warranted free of particular average. On the 1ſt of *Auguſt* the whole fleet got under way, but not being able to get clear of the iſlands, they anchored that night, and next day got clear of the iſlands. About 10 o'clock on the 2d of *Auguſt*, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain, and make water ſo faſt, that the crew were obliged to work both pumps: on the 3d the captain made a ſignal of diſtreſs, and returned to *Tortola*. A ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo; that ſhe could not be repaired in any of the *Engliſh Weſt India Iſlands*; many of the ſugars in the bilge and lower tier were waſhed out, and ſeveral

of the caſks broke and in bad order. This was held to be a total loſs, the voyage being entirely defeated. *Page* 168

Action

An action on the caſe lies againſt an agent for not having inſured agreeably to the orders of his principal. 303 note *(a)*

The only difference between this action, and that on the policy againſt the underwriters, conſiſts in form: for the plaintiff is entitled in this action, to recover the preciſe ſum he ordered to be inſured; and the defendant has every benefit of which the underwriter could have taken advantage, ſuch as fraud, deviation, non-compliance with warranty, &c. 303 note *(a)*

Such an order to inſure muſt be obeyed in the three following inſtances, otherwiſe this action will lie. Firſt, where a merchant abroad has effects in the hands of his correſpondent here. Second, where the merchant abroad has been *uſed* to ſend orders for inſurance, and the one here to comply with them. Thirdly, if the merchant abroad ſend bills of lading, and engraft on them an order to inſure, as the term of their acceptance. 304 note

If a merchant here accept an order for inſurance, and limit the broker to too ſmall a premium, by which means no inſurance can be procured, this action lies. 304 note

An action of indebitatus aſſumpſit, for money had and received for the plaintiff's uſe, is the proper form of action, in order to recover the premium. 368, 393

In order to recover upon a policy againſt either of the inſurance companies, the action muſt be *debt* or *covenant*. *Page* 396

When money has been paid by miſtake to the inſured, it may be recovered back in an action for money had and received to the plaintiff's uſe. 398

In order to recover againſt a private underwriter upon the policy, the form of action is a ſpecial *indebitatus aſſumpſit*, founded upon the expreſs contract. 397

The action may be brought in the name of the broker effecting the policy. 403

Within fifteen days after action brought, plaintiff, after requeſt in writing, muſt declare the amount of all inſurances on the ſame ſhip. *ibid*

See title *Declaration*.

Adjuſtment.

When the quantity of damage ſuſtained in the courſe of the voyage is known, and the amount, which each inſurer is to pay, is ſettled, it is uſual for the underwriter to indorſe on the policy, "adjuſted this loſs at ſo much *per cent*." This is an adjuſtment. 117

After an adjuſtment has been ſigned by the underwriter, if he refuſe to pay, the owner has no occaſion to go into the proof of his loſs, or any of the circumſtances. It is to be conſidered as a note of hand. *ibid*

After judgment by default upon a valued policy, the plaintiff's title to recover is confeſſed, and the amount of the damage is fixed by the policy. 118

If a loſs be total at the time of the adjuſtment, and the inſurer pay for a total loſs, the inſured is not obliged to refund, if it ſhould afterwards

terwards turn out to be but partial; but the insurer will stand in the place of the insured. *Page* 118

A box of bullion was wholly lost, the loss adjusted and paid, and an agreement was entered into, at the time of adjustment, that the insured would refund to the insurer whatever he should recover in such proportion as the sum insured bore to the whole interest. The bullion was afterwards fished up, and the insured paid into court the insurer's proportion, after deducting salvage. The court held this to be right. *ibid.*

Admiralty.

The sentence of a foreign Court of Admiralty is conclusive, as to every thing contained in it; but where the cause of condemnation of a ship does not appear to be on the specifick ground, material to the point in issue, parole evidence must be allowed to explain it. 353

Thus it is not conclusive to shew that a ship was not neutral, unless it appear that the condemnation went on that ground. *ibid.*

A sentence of such a Court cannot be controverted collaterally in a civil suit. 356

If it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty, and the underwriter is discharged. 359, 361, 362

Even where no special ground of condemnation is stated; but the ship is condemned as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral. 362

But if the ground of decision appear to be not on the ground of not being neutral, but on a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law, that shall not be deemed a breach of his warranty, so as to discharge the insurer. *Page* 363

If the ship be condemned as prize, and the grounds of the sentence appear manifestly to contradict such a conclusion, the Court here will not discharge the insurers, by declaring that the insured has forfeited his neutrality. 364

Agent.

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent*; for in either case, the contract is founded in deception, and the policy is consequently void. 368

This rule prevails, even though the act cannot be at all traced to the owner of the property insured. 369

A man having arrived at *Gravesend*, knowing of the loss of the ship insured, and meeting an intimate friend and acquaintance of the insured, and a partner with him in some other transactions, communicated the intelligence of the loss of the ship to him, *who desired it might be concealed*. The same day the person receiving the account, held a conversation with the plaintiff's clerk, who, notwithstanding that, swore that he had no information from him respecting the ship, nor did he get *any hint* from him, further than the

the ſaid perſon aſking the deponent, if he knew whether there was any inſurance made upon her, and if there was any account of her. The ſame day the plaintiff deſired this clerk to get an inſurance effected, which he did, without telling his maſter of this converſation. The Court of Seſſion in *Scotland* held the policy to be void; and the Houſe of Lords confirmed the decree. *P.* 209

The plaintiff's agent ſhipped goods for the plaintiff, and wrote to the plaintiff's agent in town to get an inſurance done. The letter was dated the 16th of *September*, and it contained this ſentence, "I this day ſhipped on board the *Joſeph, which ſailed immediately*, a cargo of oats," &c. This letter was not, however, ſent till one o'clock on the 17th. The caſe ſtates, that about ſix o'clock, in the evening of the 16th, *Thomas* (the agent) heard a report that the ſhip was on ſhore; and at ſix o'clock in the morning of the 17th *he knew* the ſhip was loſt. The policy was held void on account of the fraud in *Thomas*. 210

Alteration.

A policy cannot be altered after it is ſigned. 1

Unleſs there be ſome written document to ſhew that the intention of the parties was miſtaken: or unleſs it be altered by conſent of the parties. 3

Amalfitan Code.

Some account of it. Introd. p. xxv.

Aſſignment.

Policies of inſurance againſt fire are not aſſignable without conſent of the office. 449

But in marine inſurances, the policy may be transferred. 449 note (*a*)

Aſſumpſit. See *Action.*

Aſſurance. Vide *Inſurance.*

Average, General.

When goods are thrown overboard in a ſtorm to lighten the ſhip, for the general ſafety of the ſhip and cargo, the owners of the ſhip and of the goods ſaved, are to contribute for the relief of thoſe whoſe goods are ejected: this contribution is called a general average. *Page* 99, 121

Average and contribution in commercial writers, are ſynonymous terms. 121

The doctrine of average was introduced by the *Rhodians*. *ibid*

Three things, it is ſaid, muſt concur to make the act of throwing goods overboard legal: 1ſt, That what is ſo condemned to deſtruction, be in conſequence of a deliberate and voluntary conſultation between the maſter and men. 2d. That the ſhip be in diſtreſs, and that ſacrificing a part be neceſſary for the preſervation of the reſt. 3d. That the ſaving of the ſhip and cargo be owing to the means uſed with that view. But the 2d ſeems to be the only material one. 122

To an action of treſpaſs for throwing goods overboard, a man pleaded that he did it *navis levandæ cauſâ*; and that otherwiſe the paſſengers muſt have periſhed. The plea was held good. *ibid*

If the *jettiſon* (that is the throwing over of the goods) do not ſave the ſhip, but ſhe periſh in the ſtorm, there ſhall be no contribution of ſuch goods as may happen to be ſaved. 123

But if the ſhip being once preſerved by ſuch means, be afterwards loſt, the property ſaved from the ſecond accident ſhall contribute

to the loſs occaſioned by the former jettiſon. *Page* 123
The various accidents and charges, which will entitle the ſuffering party to call for a contribution, enumerated. *ibid*
If goods be put on board a lighter, to enable the ſhip to ſail into a harbour, and the lighter periſh, the owners of the ſhip and the remaining cargo, are to contribute. 124
But if the ſhip be loſt, and the lighter ſaved, the owners of the goods preſerved are not to contribute. *ibid*
Not only the value of the goods thrown overboard, muſt be conſidered in a general average; but alſo the value of ſuch as receive any damage by wet. &c. from the jettiſon of the reſt. *ibid*
If a ſhip be taken and carried into port, and the crew remain to take care of and reclaim her, the charges of reclaiming and the wages and expences of the ſhip's company, during her arreſt, and from the time of her capture, it is ſaid, ſhall be brought into a general average. *Qu. ibid*
Not ſo for ſailors' wages and proviſions, during performance of a quarantine. 125
Quære. Whether extraordinary wages and victuals, during a detention by a foreign prince, not at war, be a ſubject of average? 125, 126
It ſeems that wages, &c. during a detention to repair are. *Qu. ibid*
So where a ſhip is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading, and the wages and proviſions of the workmen hired for the repairs are a general average. 126
Diamonds and jewels, when a part of the cargo, muſt contribute according to their value. *P.* 126, 129
Ship proviſions, the perſons of the paſſengers, wearing apparel, and ſuch jewels as merely belong to the perſon, do not contribute 127
Nor do bottomry or reſpondentia bonds. 127, 422
Nor the wages of the ſailors. 127
In order to fix a right ſum, on which the average may be computed, we ſhould conſider what the whole ſhip, freight, and cargo, would have produced neat, if no jettiſon had been made; and then the ſhip, freight, and cargo are to bear an equal and proportional part of the loſs. *ibid*
The goods thrown overboard are to be eſtimated at the price, for which the goods ſaved were ſold, freight and all other charges being firſt deducted. 128
The contribution is, in general, not made till the ſhip's arrival at the port of diſcharge. 129
The inſurer by his contract, engages to indemnify the inſured againſt all loſſes ariſing from a general average. *ibid*
Average Loſs, vide *Partial Loſſes*.

Bankruptcy.

IF the original inſurer become a bankrupt, it ſhall be lawful for him or his aſſigns, to make a re-aſſurance to the amount before by him inſured, provided it be expreſſed in the policy to be a re-aſſurance. 277
The act was held to prohibit re-aſſurances on foreign ſhips, except in the caſe of bankruptcy or death of the firſt aſſurer. 279
If the inſurer, after the writing of the policy and before a loſs happen,

pen, ſhould become a bankrupt, the inſured may prove his debt under the commiſſion, as if the loſs had happened previous to the bankruptcy of the underwriter. *Page* 271 note *(a)*

This ſtatute has been held to extend to inſurances upon lives. 435

If the borrower on bottomry becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commiſſion, as if the event had actually happened. 427

Barratry.

It is barratry in the maſter to ſmuggle on his own account. 32

The derivation of the word "*barratry*," is very doubtful. 83

Any act of the maſter, or mariners, of a criminal nature, or which is groſsly negligent, tending to their own benefit, to the prejudice of the *owners of the ſhip*, and without their conſent or privity, is barratry. 83, 84

It is not neceſſary, in order to make the inſurers liable, that the loſs ſhould happen *in the very act of barratry*; for the moment the ſhip is carried from its proper track, with an evil intent, barratry is committed. 84, 90

But the loſs in conſequence of the act of barratry, muſt happen *during the voyage inſured*, and within the time limited in the policy. 84

If the act of the captain be done for the benefit of his owners, and not with a view to his own intereſt, it is not barratry. *ibid*

If the owner of the ſhip freight it out for a ſpecifick voyage, the freighter is to be conſidered as owner *pro hac vice*; and if the maſter commit a criminal act, without his privity, though with the knowledge of the original owner, it is barratry. *Page* 84, 89

The inſurers, by expreſs words, undertake generally for the barratry of the maſter and mariners. 85

If a declaration ſtate a ſhip to have been loſt by the *fraud and negligence* of the maſter, that is a ſufficient averment of a loſs by *barratry*. *ibid*

But where a ſhip ſailed a different courſe from that firſt intended, which alteration was publickly notified before the ſhip ailed, and where the maſter was to have no benefit by the change, it was held not to be barratry. 86

So if a ſhip take a prize, and inſtead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, againſt the orders of his owners, the captain is juſtified by neceſſity: and it is not barratry, becauſe not done to defraud the owners. 87

A ſhip was inſured from *London* to *Seville*; ſhe was let to freight for the voyage; ſhe ſailed from *London* to the *Downs*, from thence ſhe ſailed to *Guernſey*, *which was out of the courſe of the voyage*. The captain went there to take in brandy *on his own account*, with the knowledge of the original owner of the ſhip, *but not of the freighter for that voyage*. This was held to be barratry. 88

A breach of an embargo is an act of barratry in the maſter. *Qu.* 91

An act of the captain, *with the knowledge of the owners of the ſhip*, though without the privity of the owner of the goods, who happened to be the perſon inſured, is not barratry. 92

If

If the maſter of the ſhip be alſo the owner, he cannot be guilty of barratry. *Page* 94
The ſame rule prevails, if he commit an act, which would be barratry in any other maſter, even though he has mortgaged the ſhip. *ibid*
If the words *in any lawful "trade"* be inſerted, ſtill the underwriters are anſwerable if the captain commit barratry, by ſmuggling on his own account. 95
If any captain, or mariner, belonging to any ſhip, ſhall wilfully burn or deſtroy her, to the prejudice of any merchant loading goods thereon; *or of any perſon underwriting any policy thereon*, or to the prejudice of the owner of the ſhip, he ſhall ſuffer death as a felon, without benefit of clergy. 96, 97
If the offence be committed within the body of a county, the offender ſhall be tried in a court of common law; if upon the high ſeas, it ſhall be tried according to the directions of the 28th *Henry* 8. ch. 15. 97
Bill of Lading. See *Lading.*
Bottomry and Reſpondentia.
Bottomry is a contract, by which the owner of a ſhip borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ſhip as a ſecurity for the repayment. 410
If the ſhip be loſt, the lender alſo loſes his whole money; but if not, he ſhall receive his principal, and the ſtipulated intereſt, however it exceed the legal rate. *ibid*
When the ſhip and tackle are brought home, they are liable as well as the perſon of the borrower for the money lent. *ibid*
When the loan is not made upon the veſſel, but upon the goods, then the borrower only is *perſonally* bound to anſwer the contract, who is ſaid to take up money at *reſpondentia*. *Page* 410
In this conſiſts the chief difference between bottomry and *reſpondentia*; in moſt other reſpects they are the ſame. *ibid*
There is a third kind of contract upon the mere hazard of the voyage, without any intereſt in ſhip or goods. 411
This is prohibited as to *Eaſt India* voyages. *ibid*
The borrower on reſpondentia can only inſure the ſurplus value of the goods over and above the money borrowed. 10
The lender alone can make inſurance on the money lent. 411
All contracts made by any of his Majeſty's ſubjects by way of bottomry on the ſhips of *foreigners* trading to the *Eaſt Indies* are null and void. *ibid*
Q. Whether an *American* ſhip, ſince the declaration of American Independency, be a *foreign* ſhip within the ſtatute? 412
Bottomry aroſe from the power given to the maſter of hipothecating the ſhip and goods for neceſſaries in a foreign country. 413
But the ſhip muſt be *abroad*, and in a ſtate of *neceſſity* to juſtify ſuch an act of the maſter. *ibid*
This ſpecies of contract was known to the *Rhodians*. 415
The principle, upon which bottomry is allowed, is, that the lender runs the riſk of loſing his principle and intereſt; and therefore it is not uſury to take more than the legal rate. 416
If a contract were made, by colour of bottomry, in order to evade the the ſtatute, it would be uſurious 419

The

The legality of the contract defended. *Page* 419
But if the risk be not run, the lender is not entitled to the extraordinary premium. *ibid*
The risks, to which the lender exposes himself, are generally mentioned in the condition of the bond; and are nearly the same, against which the underwriter in a policy of insurance undertakes to indemnify. 421
Piracy is one of the risks, which the lender on bottomry runs. *ibid*
If a loss by *capture* happen, he cannot recover against the borrower *ibid*
But this does not mean a mere temporary taking; but it must be such as to occasion a total loss. *ibid*
Therefore where a ship was taken and detained for a short time, and yet arrived at the port of destination, within the time limited, it was held that the bond was not forfeited. *ibid*
If the ship be lost by a wilful deviation from the track of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation. 424
If the borrower becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commission, as if the event had actually happened. 427
Bottomry and respondentia may be insured, provided it be specified to be such interest in the policy. 9, 428
Unless the usage of trade sanctions a different proceeding. 11
When a person insures a bottomry interest, and recovers upon the bond, he cannot also recover upon the policy. *Page* 428
A lender on bottomry or at respondentia is neither entitled to benefit of salvage, nor liable to average by the law of *England*. 422
It is otherwise in *France* and in *Denmark*. 423
But if a man insure respondentia interest on a *Danish* ship, and be obliged to contribute to an average loss by the laws of *Denmark*, *English* underwriters are bound to indemnify. *ibid*

Broker

The broker, by the custom, is liable to be sued by the insurer for premiums, notwithstanding the acknowledgment by the insurer, in the policy, that he has received them. 26
The broker may maintain an action against the insured, for premiums paid on his account. 26, 27

See *Agent*.

Capture.

AS between the insurer and insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer must pay the value. 66, 77
If, either before or after condemnation, the owner retake her, and have paid salvage, the insurer must pay the loss so actually sustained. 66
If the loss be paid by the underwriter, before the recovery, he stands in the place of the insured, and will be entitled to the benefits of the restitution. *ibid*
A capture having been illegal, but the charges and delay being great, the insured made a compromise

bona fide for the liberation of the ſhip; the underwriters were held to be anſwerable for the charges of that compromiſe. *Page* 67

Before the ſtatute of 19 *Geo.* 2d, ch. 37. which aboliſhed wager policies, the recapture had a conſiderable effect upon the contract of inſurance 69

But now the contract is not at all altered between an inſurer and an inſured. *ibid*

The opinions of foreign writers with reſpect to capture and recapture, ſtated. 70

By the marine law of *England*, as practiſed in the court of Admiralty, it was formerly held, that the property was not changed ſo as to bar the original owner in favour of a vendee or recaptor, till there had been a ſentence of condemnation 71, 138

But now by ſtatute this right of the original owner, in caſe of a recapture, is preſerved to him for ever, upon payment of ſtated ſalvage to the re-captors 72, 139

Before the ſtat. of 19 *Geo.* 2. ch. 37. ſeveral caſes were determined upon the queſtion of recapture in the *Engliſh* courts; but the ſame queſtion can never again ariſe between an inſurer and inſured. 73 to 77

If the ſhip be recovered, before a demand for indemnity is made, the inſurer is only liable for the amount of the loſs actually ſuſtained at the time of the demand. 77

Or, if the ſhip be reſtored at any time ſubſequent to the payment by the underwriter, he ſhall then ſtand in the place of the inſured, and receive all the benefits reſulting from ſuch reſtitution. *ibid*

See *bottomry*.

Changing the Ship.

It being neceſſary, except in ſome ſpecial caſes, to inſert the name of the ſhip, on which the riſk is to be run in the policy; it follows as an implied condition, that the inſured ſhall neither ſubſtitute another ſhip for that mentioned in the policy before the voyage commences; in which caſe there would be no contract at all; nor during the voyage remove the property inſured from one ſhip to another, without conſent of the inſurer, or without an unavoidable neceſſity. *Page* 290

If he do, the implied condition is broken, and he cannot, in caſe of loſs, recover againſt the underwriter. *ibid*

The ſhip, on which the riſk is to be run, forms a material part of the contract. *ibid*

The opinions of *Engliſh* mercantile writers, and of foreign authors ſtated. 290, 291

Expreſly held in *England* that the inſured, except in caſes of real neceſſity, have no right to change the bottom of the ſhip; for when an inſurance is made on a ſpecific ſhip, and the inſured, without the conſent of the underwriter, changes the ſhip, he has not kept his part of the contract. 293

Cloaths.

The maſter's cloaths are not included under a general inſurance *on goods*. 21

Commencement of the Riſk.

On the goods it is uſually *from the loading*; on the ſhip, from the *beginning to load*. 23

On a policy "at and from *Bengal* to *England*," the riſk commences *from the firſt arrival* at *Bengal*. 38

Compaſs (*Mariner's.*)
Invented by a native of *Amalfi*; and it contributed greatly to the revival of commerce. Introd. xxiii
Concealment. See *Fraud.*
Conſent.
A policy may be altered by conſent, even after it is ſigned. *Page* 3
Conſolidation.
For the hiſtory of the conſolidation rule in inſurance cauſes, ſee the Introduction, page xliv.
Conſtruction of the Policy.
A policy muſt always be conſtrued as nearly as poſſible, according to the intention of the contracting parties, and not according to the ſtrict meaning of the words. 30
As policies are to be liberally conſtrued, whatever is done by the maſter in the uſual courſe, for good reaſons, though a loſs happen thereon, the inſurer is liable. 30
No rule has been more frequently followed in queſtions of conſtruction, than *the uſage of trade*, with reſpect to the voyage inſured. *ibid*
A policy on a ſhip generally from *A.* to *B.* was conſtrued to mean till the ſhip was *unloaded* 30, 31
But if it contain the uſual words "*till moored twenty-four hours in ſafety*;" the inſurers ſhall be anſwerable for no loſs, that does not happen before the expiration of the time. *ibid*
Even though the loſs was occaſioned by an act committed during the voyage inſured *ibid*
Thus where the maſter of the ſhip, during the voyage inſured, committed an act of barratry by ſmuggling on his own account; the inſurer was held not to be liable, becauſe the ſhip was not ſeized till near a month after her arrival at the port of deſtination. *Page* 30
If a ſhip be inſured for ſix months, and three days before the expiration of the time receive her death's wound; but by pumping is kept afloat till 3 days after the time, the inſurer is diſcharged. 33
The loſs muſt happen during the continuance of the voyage, or within 24 hours after her mooring at the port of deſtination. 34
Under a policy containing thoſe words, the underwriters were held liable for a ſubſequent loſs; becauſe the captain the very day, on which the ſhip arrived at her moorings, was ſerved with an order from government to return in order to perform quarantine; and therefore the ſhip could not be ſaid to have moored 24 hours *in ſafety*, although ſhe did not go back for ſome days. 35
In a policy upon *freight*, if an accident prevent the ſhip from ſailing, the inſured cannot recover the *freight*, which he *would have earned*, if ſhe had compleated her voyage. 35
But if the policy be a *valued* policy, and part of the cargo be on board when ſuch accident happens, the inſured may recover to the whole amount. 36
If a ſhip from ſtreſs of weather, is in a decayed condition, and goes to the neareſt place to refit, it is to be conſidered in the ſame light, as if ſhe had been repaired at the very place, from which the voyage was to commence, and no deviation from the terms of the policy. 37
When a ſhip is inſured, "at and from *Bengal* to *London*." *the firſt*
arrival

arrival at *Bengal* is intended to be the commencement of the riſk *Page* 38

When an inſurance is "*at and from*" the ſhip is protected during her preparation for the voyage; but if all thoughts of the voyage be laid aſide the inſurer is diſcharged. *ibid*

Where there was an inſurance on the outward and homeward bound voyage; and the latter ran "*at and from Jamaica to London*;" it was held, that the homeward riſk began when the ſhip moored at any part of the iſland, and that there the outward riſk ended, and did not continue till ſhe came to the laſt port of delivery. *ibid*

This caſe confirmed as to a policy *on the ſhip*, but the outward riſk *on goods*, continues till they are landed. 39

In conſtruing policies, the *ſtrictum jus*, or *apex juris* is not to be the rule, but a liberal conſtruction is to be adopted, and the uſage of trade called in to explain any doubts. 40

Thus in an inſurance on goods from *Malaga* to *Gibraltar*, and from thence to *England* or *Holland*, the parties having agreed that the goods might be unloaded at *Gibraltar*, and reſhipped in one or more *Britiſh* ſhip or ſhips, and it appearing in evidence that there was no *Britiſh* ſhip at *Gibraltar*, but the goods had been unloaded and put into a *ſtore ſhip* (which was always conſidered as a warehouſe) the inſurers were held to be liable for the loſs of theſe goods in the ſtore ſhip. 39, 40

A ſhip was inſured from *London* to any place beyond the *Cape of Good Hope*. The ſhip arrived in the river *Canton* in *China* where in order to be heeled and refitted ſails, &c. were taken out lodged in a *bank ſaul*, on a iſland in the river (which was proved to be *uſual* and beneficial to all concerned) the underwriter was held liable for the loſs of the ſails by fire, while in this *bank ſaul*. *Page* 41

The inſurer, at the time of underwriting, has under his conſideration the nature of the voyage, and the uſual manner of doing it. 42

What is uſually done by ſuch a ſhip, with ſuch a cargo, in ſuch a voyage, is underſtood to be referred to by every policy. *ibid*

If a ſhip be driven a mile on ſhore by a hurricane, or be burnt in a dry dock, while repairing, the inſurer is liable. 43

The goods on board the ſhips, the *Hope* and the *Anne*, were inſured at and from *Dartmouth* to *Waterford*, and from thence to the port or ports of diſcharge. on the coaſt of *Labrador*, with leave to touch at *Newfoundland*, *till the goods ſhould be ſafely diſcharged and landed*. From the time of their arrival, the crew was chiefly employed in fiſhing, and took out their cargo only at leiſure times (which was fully proved to be the uſage) and the ſhips were taken by a privateer, before they were unloaded. The court held that the inſurers were liable; for that according to the uſage there was no delay. 44

When a man inſures one ſpecies of property, he cannot recover damage, occaſioned by the loſs of a ſpecies of property different from that named in the policy. 52

Under a policy *upon the ſhip* or *upon the goods*, the inſured cannot

not recover *extraordinary wages* paid to the ſeamen, or *proviſions* expended, during a detention to repair, or a detention by an embargo. *Page* 52, 53

Nor is the underwriter *on goods* liable for the *freight* paid by the owner of the goods to the proprietors of the ſhip, where the goods were partially loſt. 53

In the conſtruction of policies, the loſs muſt be *a direct and immediate conſequence* of the peril inſured, and not a remote one, in order to intitle the inſured to recover. 56

Thus in an action upon a policy to recover the value of ſome negroes, who periſhed by *mutiny*, which was one of the riſks inſured againſt; it was held that the underwriters were liable for all thoſe, who were killed in the mutiny, or who died of their wounds: that all thoſe, who died of the bruiſes, which they received in the mutiny, though accompanied with other cauſes, were to be paid for by the underwriters. But they were not liable for thoſe, who had ſwallowed ſalt water, and died in conſequence thereof, or who leaped into the ſea, and hung upon the ſides of the ſhip, without being otherwiſe bruiſed, or who died of chagrin; all theſe having been loſt by too remote a conſequence. 56

In the conſtruction of a policy upon time, the ſame liberality prevails as in other caſes; and an attention to the meaning of the contracting parties has always been paid. 58

In an inſurance at and from *Liverpool* to *Antigua*, *with liberty to cruiſe ſix weeks*: it was held, that this meant a connected portion of time, and not a deſultory cruiſing for ſix weeks *at any time*. *Page* 58

Of the Conſtruction of Eaſt-India Policies. ſee *Eaſt-India Voyages.*

Of the Conſtruction of Loſſes by Perils of the Sea, ſee *Perils of the Sea.*

Of the Conſtruction of Loſſes by Capture, ſee *Capture.*

Of the Conſtruction of Loſſes by Detention, ſee *Detention.*

Of the Conſtruction of Loſſes by Barratry, ſee *Barratry.*

Continuance of the Riſk.

On the ſhip till her arrival at the port of deſtination, and till ſhe has been moored 24 hours in good ſafety. 23

On the goods till they are ſafely landed at the port of deſtination; which includes the carriage in the ſhip's boat to the ſhore, but not in the boat of the owner of the goods. 23

If a policy be general on a ſhip from *A.* to *B.* the underwriter has been held anſwerable till the ſhip is unloaded. 30, 31

But if it contain the uſual words, "till moored 24 hours in ſafety;" the inſurer is liable for no loſs, that does not happen before the expiration of that time. *ibid*

Even though it be occaſioned by an act done during the voyage inſured. *ibid*

If the maſter, during the voyage, commit an act of barratry by ſmuggling, and the ſhip be not ſeized till near a month after her arrival at the port of deſtination, the inſurer is diſcharged. *ibid*

If a ſhip be inſured for ſix months, and three days before the expiration of that time receive her death's wound, but by pumping

is kept afloat till three days after, the insurer is not liable.
Page 33
But the ship cannot be said to have moored 24 hours in safety, when the very day, on which she arrives at her moorings, the Captain is served with an order to return to perform quarantine, altho' he does not obey for some days: and therefore the insurer is liable for a subsequent loss. 35
Contraband, see *Prohibited Goods.*
Convoy.
If the insured warrant that the vessel shall depart with convoy, and she do not; the policy is defeated. 338
A convoy means a naval force, under the command of that person, whom government may happen to appoint. 338, 341, 389
Therefore where a ship put her self under the direction of a man of war till she should join the convoy, which had left the usual place of rendezvous before she arrived there, it was held not to be a departure with convoy, altho' she in fact joined, and was lost in a storm. 339
Aliter, if the single ship be a part of the convoy, 342
Q. Whether sailing orders from the commander in chief to the particular ships are necessary to constitute a convoy? 341, 342
A convoy appointed by the admiral, commanding in chief upon a station abroad, is a convoy appointed by government. 343
A sailing with convoy from the usual place of rendezvous, as *Spithead* for the port of *London*, is a *departure* with convoy, within the meaning of such a warranty. 343, 344
Although the words used, generally are "to depart," or to "sail with convoy;" yet it extends to sail with convoy throughout the voyage. *P.* 345
But an unforeseen separation from convoy is an accident, to which the underwriter is liable. 347
So held where a ship was separated from her convoy by storm, and by storm prevented from rejoining it, and was lost. 348
Even where the ship has been prevented by tempestuous weather from joining the convoy, at least so as to receive the orders of the commodore, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy. 348
Otherwise if the not joining be owing to the negligence and delay of the captain. 349
Corn.
Is a general expression in the memorandum at the foot of the policy, and has been held to include *peas and beans*. 112
Court.
The proper court for the trial of questions relative to policies of insurance is a court of common law. 393
Courts of equity have no jurisdiction over such questions. *ibid*
If indeed the trustee in a policy of insurance actually refuse his name to the *cestuy que trust* in an action at law, that may be a ground of application to a court of equity. 395
So also an application may be made to a court of equity for a commission to examine witnesses residing abroad. *ibid*
It is also allowable, where fraud is suspected, to apply to equity, in order to procure a disclosure of cir-

circumſtances upon the oath of the inſured *Page* 396
But in all other caſes, a court of common law is the proper forum. *ibid*
Even if the parties, by a clauſe in the policy, ſhould agree to refer any diſpute to arbitration, that will not ouſt the court of common law of its juriſdiction, unleſs a reference is in fact made, or is depending. *ibid*

Court of Policies of Inſurance.

The hiſtory of its origin and decline, Introd. xl

Cruiſe.

A liberty to cruiſe ſix weeks means to give a permiſſion to cruiſe for *ſix ſucceſſive weeks*, and not a deſultory cruiſing for forty-two days at any time. 58

Cruſades.

They contributed to the revival of commerce. Introd. xxii

Date.

THE day, month, and year, on which the policy was executed, muſt be inſerted. 27

Declaration.

In order to entitle the inſured to recover expences of ſalvage, it is not neceſſary to ſtate them in the declaration, as a ſpecial breach of the policy. 141
Thus, in a declaration on a policy on goods, it ſtated, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. Lord *Hardwicke* held, that, under this declaration, the plaintiffs might give in evidence the expences of ſalvage. 141, 409
A declaration on a policy of inſurance muſt ſet out the policy, and aver that it was ſigned by the defendant; and that in conſideration of the premium, he undertook to indemnify the inſured. *P.* 398
The declaration muſt then ſtate the intereſt of the inſured. *ibid*
It ſhould next ſhew the loſs to have happened by one of the perils mentioned in the policy; but it muſt ſtate it according to the truth. *ibid*
To aver that the loſs happened by the *fraud and negligence of the maſter* is a ſufficient averment of *barratry*. 399
In a declaration for a *total*, the inſured may recover for a partial loſs. *ibid*
Though the plaintiff appear in proof to have a larger intereſt than is averred in the declaration, yet he is entitled to recover. 402
The general iſſue, *non aſſumpſit*, is the uſual plea to a declaration upon a policy. 404
The declaration need not ſtate the clauſe in the policy to refer diſputes to arbitration. 396

Detention:

The underwriter, by expreſs words, undertakes to indemnify againſt all damages ariſing from the detention of kings, princes or people, 78
A detention is ſaid to be an arreſt or embargo, in time of war or peace, laid on by the public authority of a ſtate, *ibid*
In caſe of an arreſt or embargo by a prince, though not an enemy, the inſured is entitled to recover againſt the inſurer. *ibid*
In caſe of detention by a foreign power, which in time of war may have ſeized a neutral ſhip, in order to be ſearched for enemy's property, the charges conſequent thereon muſt be borne by the underwriter. 79
A *neutral* ſhip with *neutral* goods on

on board, conſigned to *London*, was captured off the coaſt of *Barbary* by a *Spaniſh* ſhip; ſhe was condemned as prize, becauſe ſhe refuſed to be ſearched, and reſiſted with force; and becauſe ſhe had no charter party on board. But the court held that a neutral ſhip is not obliged to ſtop to be ſearched, and the ſearcher does it at his peril: therefore, as it was a caſe of improper detention, the inſurer was held liable. *P.* 79, 80

But a detention for non-payment of Cuſtoms, or for navigating againſt the laws of thoſe countries, where the ſhip happens to be, ſhall not fall upon the underwriter. 80

Whether the inſurers are liable for the payment of damage ariſing by the detention or ſeizure of ſhips, before the commencement of the voyage, where the riſk is "at and from" by the government of the country to which they belong? Qu. 80, 81

Before the inſured can recover in caſe of detention, he muſt abandon to the inſurer whatever claims he may have to the goods inſured. 82

The time, within which the abandonment muſt be made in ſuch caſes was not till lately aſcertained in *England* by any poſitive rule. *ibid*

A detention by particular ordinances, which contravene, or do not form a part of the law of nations, is a riſk within a policy of inſurance. 365

Deviation.

Is underſtood to mean a voluntary departure, without neceſſity or any reaſonable cauſe, from the regular and uſual courſe of the ſpecific voyage inſured. 294

Whenever this happens, the voyage is determined; and the inſurers are diſcharged from any reſponſibility. *Page* 294

The reaſon of this is, becauſe the ſhip goes upon a different voyage from that againſt which the inſurer undertook to indemnify. *ibid*

It is not material whether the loſs be or be not an actual conſequence of the deviation; for the inſurers are in no caſe anſwerable for a ſubſequent loſs, in whatever place it happen, or to whatever cauſe it may be attributed. *ibid*

Neither does it make any difference whether the inſured was or was not conſenting to the deviation. *ibid*

A ſhip was inſured from *Dartmouth* to *Liverpool*; ſhe put into *Loo*; *a place ſhe muſt of neceſſity paſs by*; and although no accident befel her in going into or coming out of *Loo* (for ſhe was loſt after ſhe got out to ſea); it was held to be a deviation. 295

A ſhip being inſured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* paſs; and it was held to be a deviation. *ibid*

If the maſter of a veſſel put into a port not uſual, or ſtay an unuſual time, it is a deviation. *ibid*

The inſured ordered their broker to inſure on a particular veſſel from *Carron* to *Hull, with liberty to call as uſual*. Theſe inſtructions were entered in the broker's books, and the inſurer ſubſcribed a policy on the goods, "at and from the "loading thereof, on board the "ſaid ſhip at *Carron* wharf, and to "continue and endure until the "ſaid ſhip (*being allowed a liberty* "*to call at Leith*) ſhall arrive at "*Hull*." It being uſual for theſe veſſels to call at *Borro'ſtoneſs*, *Leith*,

Leith, and *Morison's* Haven; this veſſel ſtopt at the latter; and received no damage in going into or coming out of it. The Courts in *Scotland* held it was no deviation; but the judgment was reverſed in the Houſe of Lords. *Page* 295

If the deviation be but for a ſingle night, or for an hour, it is fatal. 298

A ſhip was bound from *Cork* to *Jamaica*, under convoy. Being of force, ſhe, with two other veſſels, took advantage of the night, and cruized in hopes of meeting with a prize; it was held a deviation. *ibid*

But if a merchant ſhip carry letters of marque, ſhe may *chace* an enemy, though ſhe may not *cruize*, without being deemed guilty of a deviation. 295

Wherever the deviation is occaſioned by abſolute neceſſity; as where the crew forced the captain to deviate, the underwriter continues liable. *ibid*

The juſtifications for a deviation ſeem to be theſe; to repair the veſſel; to avoid an impending ſtorm: to eſcape from an enemy; or to ſeek for convoy. 300

If a ſhip tis decayed and goes to the neareſt port to refit, it is no deviation. 300, 301

Wherever a ſhip, in order to eſcape a ſtorm, goes out of the direct courſe; or, when in the due courſe of the voyage, is driven out of it by ſtreſs of weather; this is no deviation. 302

If a ſtorm drive a ſhip out of the courſe of her voyage, and ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return to the point from which ſhe was driven. 303

A ſhip was warranted to ſail with convoy from *England* to *St. Kitt's*; and was ſeparated from convoy by a ſtorm. The captain ſwore that his invariable object, after the ſeparation, was to gain *St. Kitt's*, or to fall in with convoy. The ſhip being taken, it was held that the deviation was excuſed. *Page* 302

In another caſe, where a ſhip had been driven out of her port of loading, into another port, by ſtreſs of weather, and ſhe often attempted to return but could not; it was held that ſhe was not guilty of a deviation, though ſhe did not, in fact, return to the port from whence ſhe was driven. 303

A deviation may alſo be juſtified, if done to avoid an enemy or to ſeek for convoy. 308

A ſhip being inſured and warranted to depart with convoy from *Bremen* to *London*, ſet ſail from *Bremen* to the *Elbe*, under convoy of a *Dutch* man of war, where they were joined by two other *Dutch* men of war, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war. It was held that their going to the *Elbe*, though out of the way, was no deviation. 308

A ſhip was inſured from *London* to *Gibraltar*, warranted to depart with convoy. There was a convoy appointed for that trade at *Spithead*, but the ſhip was loſt in her way thither. The court held that the ſhip was protected by the inſurance to a place of general rendezvous. *ibid*

Where a captain juſtifies a deviation by the uſage of a particular trade, there muſt be a clear and eſtabliſhed uſage; not

not a few vague inſtances only. *Page* 309

Wherever a ſhip does that which is for the general benefit of all parties concerned the act is as much within the ſpirit of the policy as if it had been expreſſed: and in order to ſay whether a deviation be juſtifiable or not, it will be proper to attend to the motives, end, and conſequences of the act as the true ground of judgment. 310

It has been held, that if a ſhip deviate from neceſſity, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and in the ſhorteſt time poſſible, otherwiſe the underwriters will be diſcharged. *ibid*

In ſuch a caſe nothing more muſt be done than what the neceſſity requires, 313

A deviation *merely intended*, but never carried into effect, does not diſcharge the inſurers. 314

But if it can be ſhewn that the parties never intended to ſail upon the voyage inſured; if all the ſhip's papers be made out for a different place from that deſcribed in the policy; the inſurer is diſcharged, though the loſs ſhould happen before the dividing point of the two voyages, *ibid*

Thus where a ſhip was inſured from "*Maryland* to *Cadiz*," it appeared that the ſhip was cleared to *Falmouth* and a bond was given that all the *enumerated* goods ſhould be landed in *Britain*: an affidavit of the owner ſtated the ſhip to be bound for *Falmouth*; and the bills of loading were," to *Falmouth*, and a market." There was no evidence of her being deſtined for *Cadiz*. The court held that the inſurers were not liable, although the ſhip was taken before the dividing point of the two voyages *Page* 315

As it is ſettled that a *mere intention to deviate* will not vacate the policy, it follows as a conſequence, and has been ſo held, that whatever damage happens before actual deviation, falls upon the underwriters. 316

Subject to the rules already advanced deviation or not is a queſtion of fact to be decided according to the circumſtances of the caſe. 317

In caſes of deviation, the premium is not to be returned. *ibid*

Double Inſurance.

It is where the ſame man is to receive two ſums inſtead of one; or the ſame ſum twice over, for the ſame loſs, by reaſon of his having made two inſurances upon the ſame property. 280

Difference between a re-aſſurance and a double inſurance, *ibid*

Where a man makes a double inſurance, he may recover his loſs againſt which ſet of underwriters he pleaſes; but he can recover for no more than the amount of his loſs. *ibid*

But when one ſet of underwriters pay the loſs, they may call upon the other underwriters to contribute in proportion to the ſums they have inſured. 281

But though a double inſurance cannot be wholly ſupported, ſo as to enable a man to recover a two-fold ſatisfaction; yet various perſons may inſure various intereſts on the ſame thing, and each to the whole value; as the maſter for wages; the owner for freight; one perſon for goods and another for bottomry. *Page* 282

In what caſes a man ſhall be ſaid to make a double inſurance; and when

when not, fully conſidered from page *Page* 283 to 288
If the ſame man for his own account, *though not in his own name* inſures doubly, it is ſtill a double inſurance. 285
The laws of foreign countries, upon the ſubject of double inſurance, are far from being uniform. 288

Eaſt India Voyages

THE uſage of trade with reſpect to theſe voyages has been more notorious than in any other, the queſtion having more frequently occurred. 46
The charter parties of the *India* Company give leave to prolong the ſhip's ſtay in *India* for a year, and it is common by a new agreement, to detain her a year longer. The words of the policy too are very general without limitation of time or place. *ibid*
Theſe charter parties are ſo notorious, and the courſe of the trade is ſo well known, that the underwriter is always liable for any intermediate voyage, upon which the ſhip may be ſent, while in *India*, though not expreſsly mentioned in the policy. *ibid*
Thus, where the inſurance was "at "and from *Bengal* to any ports "or places whatſoever, in the *Eaſt-* "*Indies*, *China*, *Perſia*, or elſe- "where beyond the *Cape of Good* "*Hope*, forwards and backwards, "and during her ſtay at each "place, until her arrival in *Lon-* "*don*, &c" The captain when in *Bengal* entered into a new agreement for prolonging the ſhip's ſtay, and went ſeveral intermediate or country voyages, in the laſt of which ſhe was loſt; the inſurers were held liable. 47
In an inſurance "from *London* to "*Madras* and *China*, with liber- "ty to touch, ſtay, and trade at "any ports or places whatſoe- eve," the facts were; that when the ſhip arrived at *Madras*, ſhe was too late to go to *China* that year, upon which ſhe was ſent by the council to *Bengal* to fetch rice, which voyage ſhe performed once, but in the ſecond attempt ſhe was loſt. The inſurers are anſwerable on account of the uſage. *Page* 49
In an inſurance on a ſhip "at and "from *London* to *Bengal*, begin- "ning the riſk upon the ſhip at "*London*, and ſo to continue till the "arrival of the ſaid ſhip at *Madras* "and *Bengal*, *with liberty to touch* "*and ſtay at any port or place in* "*this voyage*;" the underwriters were held to be anſwerable for a loſs which happened in an intermediate voyage from *Madras* to *Viſagipatnam* for rice by order of the council. 50
However, the parties may, by their own agreement, prevent ſuch latitude of conſtruction. 51
Nor need this be done by expreſs words of excluſion; but if *from the terms uſed*, it can be collected that the parties meant ſo, that conſtruction ſhall prevail. *ibid*
Thus where the general words were reſtrained by the expreſſions "*in the outward or homeward bound voyage*:" and "*in this voyage*;" the court held that the policy only meant places in the uſual courſe of the voyage "to and from the places named." 51

Embargo.

An embargo is an arreſt laid on ſhip or goods by public authority tos prrevent ſhips from putting to ſea

in time of war, and ſometimes alſo to exclude them from entering our ports. *Page* 78
Q. Whether a prince in time of war may make uſe of the veſſels he finds in his ports, to aſſiſt him in carrying on war? *ibid*
Extraordinary wages paid to the ſeamen during an embargo, cannot be recovered againſt the inſurer *on the ſhip*. 54
The king of *Great-Britain in time of war*, may lay an embargo on ſhipping in the ports of his kingdom. Q. Whether he may do it, in time of peace? 79
The breach of an embargo is an act of barratry in the maſter. 91
If a ſhip though neutral, be inſured on a voyage prohibited by an embargo, ſuch an inſurance is void. 234

Enemy.

The queſtion whether inſurances on the property of an enemy, are politic, conſidered. 13, 240
Such inſurances are not contrary to any poſitive law of *England*. 14 *ibid*
How far trading with an enemy in time of actual war is legal. 237

Evidence

Opinion of witneſſes is not evidence. 59, 192
A policy will not be ſet aſide on the ground of fraud, unleſs it be *fully* and *ſatisfactorily* proved, and the burden of proof lies upon the perſon wiſhing to take advantage of the fraud. 214
But poſitive and direct proof of fraud is not to be expected; and from the nature of the thing circumſtantial evidence is all that can be given. *ibid*
The nature of circumſtantial evidence conſidered. 215
The ſentence of a foreign court of Admiralty is concluſive and binding upon all the world, as to every thing contained in it; and cannot be controverted collaterally in a civil ſuit. *P.* 353, 356
See *Admiralty*.
The firſt piece of evidence to ſupport an action on the policy is proof of the defendant's hand writing to the policy. 404
No parole evidence of any agreement ſhall be admitted, which tends to contradict the written policy. 405
The inſured muſt alſo prove his intereſt in the thing inſured, by a production of all the uſual documents, bills of ſale, bills of parcels, bills of lading, &c 406
A man having purchaſed goods abroad, in order to prove his intereſt, produced a bill of parcels with the receipt of the ſeller to it, and proved his hand; it was held to be ſufficient evidence. *ibid*
The plaintiff muſt prove that a loſs has happened by the very means ſtated in the declaration. 407
But where the loſs is averred to be by perils of the ſea, it is allowable to give the expence of the ſalvage in evidence upon ſuch a declaration. 409

Factor.

THE lien which a factor has upon the goods of his principal, is ſuch an intereſt, as will entitle him to recover on a general policy on goods. 11, 286

Felony.

Wilfully to caſt away, burn, or deſtroy any ſhip to the prejudice of the owners of the ſaid ſhip, or any merchant loading goods thereon, or of the underwriters, is felony, without the benefit of clergy in

any captain, maſter, mariner, or other officer belonging to the ſhip ſo deſtroyed. *Page* 96, 219

Any perſon boring holes in a ſhip in diſtreſs, or ſtealing a pump belonging thereto, ſhall be guilty of felony without benefit of clergy. 135

Perſons convicted of ſtealing goods from a ſhip wrecked, or in diſtreſs, or of obſtructing the eſcape of any perſon from a wreck, or of putting out falſe lights to lead ſuch ſhip into danger, ſhall ſuffer as felons without benefit of clergy. *ibid*

Where goods of ſmall value are ſtolen, without any circumſtances of cruelty, the offender may be indicted for petty larceny. *ibid*

Perſons, in whoſe cuſtody ſhipwrecked goods are found, not giving a ſatisfactory account, ſhall be committed to the common gaol for ſix months, or pay treble the value of ſuch goods. *ibid*

Goods offered to ſale, ſuſpected of being ſhipwrecked, ſhall be ſtopped, and the perſon ſo offering them, and not giving a ſatisfactory account, ſhall be committed to the common gaol for ſix months, or pay treble the value of ſuch goods. 135

Perſons convicted of aſſaulting any magiſtrate or officer, when in diſcharge of his duty, reſpecting the preſervation of any ſhip, veſſel, goods or effects ſhall be liable to tranſportation for ſeven years. 137

Fire (*Inſurance againſt*)

Is a contract, by which the inſurer undertakes, in conſideration of the premium, to indemnify the inſured, againſt all loſſes, which he may ſuſtain in his houſe, or goods by means of fire within the time limited in the policy. *P.* 441

The *London* Aſſurance Company inſert a clauſe in their propoſals, by which they declare, that they do not hold themſelves liable for any damage by fire, occaſioned by an invaſion, foreign enemy, or any military or uſurped power whatſoever. *ibid*

Under this proviſo it was held, that the inſurers were not exempted from loſs by fire, occaſioned by a mob at *Norwich*, which aroſe on account of the high price of proviſions 442

The ſun fire office, in addition to theſe words, add "*civil commotion*," it was held that the company, under thoſe words, were exempted from loſſes occaſioned by rioters, who roſe in the year 1780, to compel the repeal of a ſtatute, which had paſſed in favour of the *Roman* catholics. 445

When a loſs happens. the inſured muſt give immediate notice of his loſs; and as particular an account of the value, &c. as the nature of the caſe will admit. He muſt alſo produce a certificate of the miniſter and church wardens, as to the character of the ſufferer, and their belief of the truth of what he advances. 448

In inſurances againſt fire, the loſs may be either partial or total. 449

Theſe policies are not in their nature aſſignable; nor can the intereſt in them be transferred without the conſent of the office. *ibid*

When any perſon dies, the intereſt ſhall remain to the heir, executor or adminiſtrator, reſpectively, to whom the property inſured belongs; provided they procure their right to be indorſed on the policy, or

or the premium be paid in their name. *Page* 449

It is neceſſary the party inſured ſhould have an intereſt or property in the houſe inſured, at the time the policy is made out, and at the time the fire happens; and therefore, after the leaſe of the houſe is expired, the inſured's aſſigning the policy does not oblige the inſurers to make good the loſs to the aſſignee. 450

The premium upon common inſurances is two ſhillings *per cent* for any ſum not exceeding 1000*l.* and half a crown from 1000*l.* upwards. 456

Beſides which there is a duty to government of 1*s.* 6*d.* *per cent.* *ibid*

This tax does not extend to publick hoſpitals. *ibid*

If a houſe were deſtroyed by a foreign enemy the day after the policy is made, there would be no return of premium. 457

If any perſon ſign a policy of inſurance againſt fire, not being duly ſtamped, he ſhall forfeit 10*l.* and muſt pay 5*l.* over and above the uſual ſtamp duties, before it can be received in evidence. *ibid*

Fraud vitiates this ſpecies of contract. *ibid*

Foreign Ships.

Inſurances on foreign ſhips without intereſt are not within the ſtat. of 19 *Geo.* 2. c. 37. 265

But re-aſſurances on foreign ſhips are void. 279

Fort.

A fort may be inſured againſt an attack from an enemy, for the benefit of the governor. 13

France.

An account of its commercial and maritime regulations; and the diſtinguiſhed authors, who have written upon the ſubject of inſurances. *Intr. Page* xxxiii.

Fraud.

Policies are annulled by the leaſt ſhadow of fraud or undue concealment of facts. 174

Both parties are equally bound to diſcloſe circumſtances, within their knowledge. *ibid*

If the inſurer at the time he underwrote, knew that the ſhip was ſafe arrived, the contract will be void. *ibid*

Caſes of fraud upon this ſubject are liable to a threefold diviſion; 1ſt. The *allegatio falſi*; 2d. The *ſuppreſſo veri*; 3d. Miſrepreſentation. The latter though it happen by miſtake, if in a material part, will vitiate the policy, as much as actual fraud. *ibid*

The policy was held to be void, where goods were inſured as the property of an ally, when in fact they were the goods of an enemy. 175

A ſhip was known to have ſailed from *Jamaica*, on the 24th of *November*; and the agent told the inſurer ſhe ſailed the latter end of *December*; the policy was declared void. 176

In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral, it was expreſsly found by the jury, that they were not neutral. The court, therefore, though the loſs happened by ſtorms, and not by capture, declared that the inſured could not recover. *ibid*

Goods were inſured on board a ſhip, warranted *Portugueſe*. The goods were loſt by a different peril, but in fact the ſhip was not *Portugueſe*. The policy is void *ab initio*. 177

Concealment of circumſtances vitiates

ates all contracts of inſurance. The facts upon which the riſk is to be computed, lie, for the moſt part, within the knowledge of the inſured only. The underwriter relies upon him for all neceſſary information; and muſt truſt to him that he will conceal nothing, ſo as to make him form a wrong eſtimate. *Page* 178

One having an account that a ſhip, deſcribed like his, was taken, inſured her, without giving any notice to the inſurers of what he had heard, the policy was decreed in equity to be delivered up. 179

The agent for the plaintiff two days before he effected the policy, received a letter from *Cowes*, in which is this expreſſion, "On "the 12th of this month I was "in company with the *Davy* "(the ſhip in queſtion) at twelve "at night loſt ſight of her all at "once; the captain ſpoke to me "the day before that ſhe was "leaky, and the next day we "had a hard gale." The ſhip, however, rode out the gale, and was captured by the *Spaniards*. The policy was held to be void, becauſe the letter was not communicated to the inſurer. 197

A ſhip was inſured "*at and from* "*Genoa*." The ſhip loaded at *Leghorn*, and was originally bound for *Dublin*; but loſing her convoy, ſhe put into *Genoa* in *Auguſt*, and lay there till the *January* following. All theſe facts were known to the inſured, but not communicated to the inſurer: the policy was held to be void. 180

A ſhip being bound from the coaſt of *Africa* to the *Britiſh Weſt Indies*, ſailed from *St. Thomas*'s on the coaſt of *Africa* on the 2d of *October*, a circumſtance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21ſt of *March*. The letter was not ſhewn, nor was any thing ſaid of her ſailing from *St. Thomas*'s, but in the inſtructions "the ſhip was ſaid to have been "on the coaſt the 2d of *October*." The policy was held to be void. *Page* 181

The broker's inſtructions ſtated *the ſhip ready to ſail on the 24th of December*; the broker repreſented to the underwriter that the ſhip was in port, when in fact ſhe had ſailed the 23d of *December*. The policy was void. 182

But there are many matters, as to which the inſured may be innocently ſilent; 1ſt, As to what the inſurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what leſſens the riſk. An underwriter is bound to know particular perils, as to the ſtate of war or peace. 183

If a privateer is inſured, the underwriter needs not be told her deſtination. *ibid*

An inſurance was made on *Fort Marlborough* in the *Eaſt Indies* for twelve months againſt the attacks of an *European* enemy, for the benefit of the governor. The defence ſet up was an undue concealment of circumſtances, particularly the weakneſs of the fort, and the probability of its being attacked by the *French*. The court held that the policy was good. 183

The whole doctrine of concealment fully illuſtrated from page 183 to 193

A ſhip was inſured "from *London* "to

" to *Nantz*, with liberty to call " at *Oſtend*." The ſhip's clearances and papers were all made out for *Oſtend*; but ſhe was never intended to go thither. After the policy was made, war was declared againſt *France*. Two defences were ſet up; 1ſt, that there was a fraud in clearing out the ſhip for *Oſtend*, when ſhe never was deſigned for that place. 2d, That as hoſtilities were declared after the policy was ſigned, and before the ſhip ſailed, the defendant ought to have had notice. The court held that neither of the objections was valid; for the firſt was the common uſage; and of the ſecond the inſurer was bound to take notice. *Page* 193

An underwriter refuſed to pay a loſs by capture, the ſhip being *Portugueſe* and condemned for having an *Engliſh* ſupercargo on board, becauſe the inſured had not diſcloſed that circumſtance. The court held that the condemnation was unjuſt, and was not ſuch a circumſtance as the inſured was bound to diſcloſe. 195

A repreſentation is a ſtate of the caſe, not forming a part of the written inſtrument or policy: and it is ſufficient if it be ſubſtantially performed. 196, 202

If there be a miſrepreſentation it will avoid the policy, as a fraud, but not as a part of the agreement. 197

Even written inſtructions, if they are not inſerted in the policy, are only to be conſidered as repreſentations; and in order to make them valid and binding as a warranty, it is neceſſary that they make a part of the written inſtrument. 197

If a repreſentation be falſe in any material point, it will avoid the policy; becauſe the underwriter has computed the riſk upon circumſtances, which did not exiſt. *Page* 197

The following inſtructions were ſhewn to the firſt underwriter, but not inſerted in the policy, " Three thouſand five hundred " pounds upon the ſhip *Julius* " *Cæſar* for *Halifax*, to touch at " *Plymouth*, and any port in " *America: ſhe mounts twelve* " *guns and twenty men.*" Theſe inſtructions were not ſhewn to the preſent defendant, but ſhe was repreſented *generally as a ſhip of force*. At the time of her capture, ſhe had on board 6 four pounders, 4 three pounders, 3 one pounders, 6 ſwivels, and 27 men and boys in all, of which 16 only were men. The witneſs ſaid, he conſidered her as being ſtronger with this force, than if ſhe had 12 carriage guns, and 20 men; and that there were neither men nor guns on board, at the time of the inſurance. The court held, that theſe inſtructions were only a repreſentation; and that they had been ſubſtantially performed. *ibid*

A ſhip was inſured at and from *Port L'Orient* to the *Iſles of France* and *Bourbon*, and to all or any ports or places where, and whatſoever, in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere beyond the *Cape of Good Hope*, from place to place, and during the ſhip's ſtay and trade, backwards and forwards, at all ports and places, and until her ſafe arrival back at her laſt port of diſcharge in *France*. A ſlip of paper, at the time

time the policy was underwritten, was *wafered* to it, and ſhewn to the underwriters, on which was written the following repreſentation: "The ſhip has had a com- "plete repair, and is now a fine "and good veſſel, three decks. "Intends to ſail in *September* or "*October* next. Is to go to *Ma-* "*deira*, the *Iſles of France*, *Pon-* "*dicherry*, *China*, the *Iſles of* "*France*, and *L'Orient*." The ſhip, in fact, did not ſail till the 6th of *December*, and did not reach *Pondicherry* till the month of *July* following. She continued there till *Auguſt*, when inſtead of proceeding for *China*, ſhe ſailed for *Bengal*, where having paſſed the winter and undergone conſiderable repairs, ſhe returned to *Pondicherry*, and after taking in a homeward bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken by the *Mentor* privateer. The uſual time, in which the direct voyage is performed between *Pondicherry* and *Bengal* is ſix or ſeven days; but this ſhip was ſix weeks in going to, and two months in returning from *Bengal*, and lay off *Madras*, *Maſulipatam*, *Viſigapatam*, and *Yanon*, and took in goods at all thoſe places. Lord *Mansfield* told the jury, that if no fraud was intended, and that the variance between the intended voyage, as deſcribed in the ſlip of paper, and the actual voyage as performed did not tend to encreaſe the riſk, *this ſlip of paper being only a repreſentation*, the plaintiff was entitled to their verdict. *Page* 202

If the miſrepreſentation be in a *material* point, it will avoid the policy; even though it happen by miſtake. *Page* 204

Thus in a policy on a ſhip from *New York* to *Philadelphia*, the broker repreſented to the inſurer that the *ſhip was ſeen ſafe in the Delaware on the 11th of December* by a ſhip which arrived at *New York*; whereas in fact the ſhip was loſt on the 9th of *December*; the policy was held to be void, although there was no ſuſpicion of fraud. 205

The ſame rule holds if the broker conceal any thing *material*, though the only ground for not mentioning them ſhould be that the facts concealed appeared immaterial to him, 207

But the thing concealed muſt be ſome *fact*, not a *mere ſpeculation or expectation* of the inſured. *ibid*

Thus where a broker inſuring ſeveral veſſels, ſpeaking of them all, ſaid "which veſſels are *ex-* "*pected* to leave the coaſt of "*Africa* in *November* or *De-* "*cember*;" the policy was held good, although in fact the ſhip in queſtion had ſailed in the month of *May* preceding. *ibid*

Wherever there has been an allegation of falſhood, a concealment of circumſtances, or a miſrepreſentation, it is immaterial whether it be the act of the perſon himſelf who is intereſted, or *of his agent*; for in either caſe the contract is founded in deception, and the policy is conſequently void. 208

This rule prevails, even though the act cannot be at all traced to the owner of the property inſured. 209

A man having arrived at *Greenock*, knowing of the loſs of the ſhip inſured,

insured, and meeting an intimate friend and acquaintance of the insured, and a partner with him in some other transactions, communicated the intelligence of the loss of the ship to him, *who desired it might be concealed.* The same day the person receiving the account held a conversation with the plaintiff's clerk, who, notwithstanding that, swore that he had no information from him respecting the ship, nor did he get *any hint* from him, further than the said person asking the deponent, if he knew whether there was any insurance made upon her, and if there was any account of her. The same day the plaintiff desired this clerk to write to get an insurance effected, which he did, without telling his master of this conversation. The Court of Session in *Scotland* held the policy to be void; and the House of Lords confirmed the decree. *Page* 209

The plaintiff's agent shipped goods for the plaintiff, and wrote to the plaintiff's agent in town to get an insurance done. The letter was dated the 16th of *September*, and it contained this sentence, "I "this day shipped on board the "*Joseph, which sailed immedi-* "*ately*, a cargo of oats, &c" This letter was not however sent till one o'clock on the 17th. The case states, that about six o'clock in the evening of the 16th, *Thomas* (the agent) heard a report that the ship was on shore; and at six o'clock in the morning of the 17th *he knew* the ship was lost. The policy was held void on account of the fraud in *Thomas.* 210

A policy will not be set aside on the ground of fraud, unless it be *fully* and *satisfactorily* proved; and the burthen of proof lies on the the person wishing to take advantage of the fraud. *Page* 214

But positive and direct proof of fraud is not to be expected; and from the nature of the thing circumstantial evidence is all that can be given *ibid*

The question, whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered, 215

The ordinances of foreign states declare, for the most part, that it shall. *ibid*

In *England* there has been no legislative regulation; and the courts of justice have not, as yet, adopted any general rule upon the subject. 216

In two or three instances, where the underwriters have been relieved in Chancery from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned: *ibid*

The question came on to be considered in the King's Bench; but the trial being had under a decree of the Court of Chancery, and the insurer having there made an offer of returning the premium, the Court of King's Bench considered this offer in the same light as if he had paid the money into court, and therefore the question remained undecided. 217

But in a case where the fraud was of a very gross and heinous nature, Lord *Mansfield* told the jury, that the premium should not be restored to the insured. 218

It is clear, that if the underwriter

ter has been guilty of fraud, an action *lies* againſt him at the ſuit of the inſured, to recover the premium. *Page* 218

By ſeveral foreign ordinances, the puniſhment of fraud, in matters of inſurance, is exceedingly ſevere; ſometimes amounting even to death. *ibid*

No puniſhment except that of annulling the contract, has as yet been declared by the law of *England*. 219

But if any captain, &c. wilfully deſtroy the ſhip to which he belongs, to the prejudice of the owner of the ſhip, or of the goods loaded thereon, or of the underwriters, he ſhall ſuffer death as a felon. *ibid*

Fraud vitiates policies on lives, as well as thoſe on marine inſurances. 437

It has the ſame effect on policies inſuring againſt fire. 457

Freight.

The freight or hire of ſhips is a ſubject of inſurance. 9

In an inſurance upon *freight*, the inſured, if the ſhip be prevented by accident from ſailing, cannot recover the value of the freight, which *he would have earned*. 35

But if the policy be a valued policy, and part of the cargo be on board when ſuch accident happens, the reſt being ready to be ſhipped, the inſured may recover to the whole amount. 36

The underwriter upon the *goods* is not liable for *freight* paid to the owner of the ſhip. 53

Freight muſt contribute to a general average. 128

Gaming policies. See title *Wager policies.*

General Average. See *Average.*

Greeks.

SOME account of their commerce; they are ſuppoſed to have been unacquainted with inſurance. Introd. vii

Hanſeatick League.

AN account of its origin and decline. Introd. xxxi

Huſband of a Ship

The huſband of a ſhip has no right to inſure for any part owner, without his particular direction, nor for all the owners in general without their joint direction. 19

Jettiſon or *Jetſon.* See *Average*

Illegal Voyages.

WHENEVER an inſurance is made on a voyage expreſsly prohibited by the common, ſtatute or maritime law of this country, the policy is void. 232

The goods on board a ſhip were inſured "at and from *London* to *New-York*, warranted to depart with convoy from the channel for the voyage." She had proviſions on board, which ſhe had a licence to carry to *New York* under a proviſo in the prohibitory act of 16 *Geo.* 3. c. 5. But *one half of the cargo, including the goods, which were the ſubject of this inſurance, was not licenſed.* The commander in chief had iſſued a proclamation to allow the entry of unlicenſed goods; but he had no authority under

under the act of parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods. The ſtatute prohibits all intercourſe with *New York*, and confiſcates all ſhips trading to that place, unleſs they have a licence. The court held the policy was void. *Page* 232

It is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot ſubſtantiate a contract in direct contradiction to law. 234

If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo, ſuch an inſurance is void. *ibid*

An inſurance upon a ſmuggling voyage prohibited by the revenue laws of this country would be void. *Aliter*, if merely againſt the revenue laws of a foreign ſtate. 236

No country pays attention to the revenue laws of another, 236, 237

The queſtion, how far trading with an enemy, in time of actual war, is legal, conſidered and diſcuſſed from page. 237 to 240

The queſtion how far inſurances upon the goodsof an enemy are expedient conſidered, from page 240 to 243

Whether they are expedient or not, ſuch inſurances are not againſt any poſitive law. 242

But no inſurance can be made upon a voyage to a beſieged fort or garriſon, with a view of carrying aſſiſtance to them; or upon ammunition, warlike ſtores, or proviſions. 242

Inſurance,

Inſurance is a contract, by which the inſurer undertakes, in conſideration of a premium, equivalent to the hazard run, to indemnify the inſured againſt certain perils and loſſes, or againſt a particular event. Introd. it

The utility of this contract. Introd. *ibid*

The origin of it traced. Introd. iii

The queſtion, whether it was known to the ancients, conſidered. Introd. *ibid*

Inſurances ſuppoſed to have originated in *Italy*. Introd. xxiii

The *Italians* brought them into the various ſtates of *Europe*, and into *England*. Introd. xxv. xxxviii

Inſurances are merely ſimple contracts. 1

What kinds of property are the object of inſurance. 9

Bottomry and Reſpondentia are a ſpecies of property which may be inſured. *ibid*

But it muſt be ſpecified in the policy to be ſuch an intereſt, otherwiſe the policy is void. 9

Unleſs the uſage of the trade takes it out of the general rule. 11

But where the inſurance is upon goods generally, the lien which a factor has upon the goods of his principal, when a balance is due is ſuch an intereſt, as will entitle him to recover upon ſuch a policy. *ibid*

Inſurances on the wages of ſeamen are prohibited. 12

A governor may inſure the fort againſt the attack of an enemy, for his own benefit. 13

Inſurances on enemy's property not contrary to the poſitive law of *England*. 13, 14, 240

In an inſurance *on goods* generally, goods laſhed on deck, the captain's cloaths and ſhip's proviſions are not included, unleſs ſpecifically named. 21

In-

Insurance from *A.* to —— is void. *Page* 22
Insurances for time are very frequent, as on a ship for twelve months 58
Insurances upon a voyage prohibited by the common, statute or maritime law of the country, are void. 232
See title *Illegal Voyages.*
Insurances on a voyage to a besieged fort or garrison, with a view of carrying assistance to them. or upon ammunition, warlike stores, or provisions, are prohibited. 243
Insurances upon prohibited goods. See title *Prohibited goods.*
Insurances void by stat. 19. *Geo.* 2. *c.* 37. See *Wager Policies.*
Insurances on Lives. See title *Lives.*
Insurances against Fire. See title *Fire.*
Insurers.
What persons may be insurers. 5
Every individual may be an insurer or underwriter. 9
But no society or partnership can underwrite, except the Royal Exchange Assurance Company, and the *London* Assurance Company. *ibid*
What shall be considered as a partnership within the statute of 6 Geo. 1. c. 18. 8
Insurers are liable for losses, which happen in the ship's boats, when landing the goods insured. 23
Aliter, if in the boat of the owner of the goods. *ibid*
Q. Are the insurers liable for thefts committed by the people on board the ship? 25
Insured.
The name of the insured must be inserted in the policy; or the name of the agent who effects it *as agent.* 15, 16, 17
This matter is now regulated by 28 Geo. 3. ch. 56. *Page* 18, 19
Q. Whether an action against the insured for premiums at the suit of the underwriter? 26
The broker, who effects the policy, may maintain such an action for premiums paid on his account. 27
Intention.
The intention of the parties, and not the literal meaning of the words, is to be attended to in the construction of policies. 30
Interest or no interest, see title *Wager Policies.*
Interest.
A merchant abroad, interested in goods mortgages them to his creditor here for payment of money at a certain day, the mortgagor has an insurable interest, though the mortgage become absolute, before the order for insurance arrives. 406
The indorser of a bill of lading has still an insurable interest, if it appear that the effect of the indorsement was only intended to bind the net proceeds, in case the goods arrived. 406 note (*a*)
A person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. 432

Lading (Bill of)

A BILL of lading is an acknowledgement under the hand of the captain, that he has received certain goods, which he undertakes to deliver to the person named in the bill of lading; it is assignable in its nature, and by *indorsement* the property vests in the assignee. 406 note (*a*)

Where

Where ſeveral bills of lading of different imports have been ſigned, no reference is to be had to the time, when they were firſt ſigned by the captain: but the perſon who firſt gets one of them by a legal title from the owner or ſhipper, has a right to the conſignment. *Page* 406

Where bills of lading on the face of them are apparently different, and yet conſtructively the ſame, and the captain has acted *bona fide*, a delivery according to ſuch legal title will diſcharge him from them all. *ibid*

But if the intention of the parties appears to have been to bind the net proceeds only, in caſe of the arrival of the goods, an inſurance made on account of the indorſer is good. *Page* 406

Lives (*Inſurances upon*)

INSURANCE upon life is a contract, by which the underwriter for a certain ſum, proportioned to the age, health, and profeſſion, of the perſon, whoſe life is the object of the inſurance, engages that that perſon ſhall not die within the time limited in the policy; or if he do, that he will pay a ſum of money to him, in whoſe favour the policy was granted. 429

The advantages reſulting from this ſpecies of contract ſtated. *ibid*

It is impoſſible to aſcertain its antiquity. 430

No inſurance ſhall be made on the life or lives of any perſon or perſons; wherein the perſon, for whoſe uſe the policy is made, *ſhall have no intereſt, or by way of gaming or wagering:* but ſuch inſurance ſhall be null and void. *Page* 431

The holder of a note for money won at play has not an inſurable intereſt in the life of the maker of the note. 432

In a life inſurance, the inſurer undertakes to anſwer for all thoſe accidents, to which the life of man is expoſed, except ſuicide, or the hands of juſtice. 433

The death muſt happen within the time limited in the policy; otherwiſe the inſurers are diſcharged. *ibid*

If a man receive a mortal wound during the exiſtence of the policy, but does not in fact die till after, the inſurers are not liable. 433

But if a man, whoſe life is inſured, goes to ſea, and the ſhip in which he ſailed is never heard of afterwards, the queſtion whether he did or did not die within the term inſured, is a fact for the jury to aſcertain from the circumſtances. *ibid*

This ſort of policy being on the life or death of man, does not admit of the diſtinction between total and partial loſſes. 434

In a life inſurance it has been held, that if the inſurer become bankrupt before the loſs happens, the perſon intereſted might prove the debt under the commiſſion, as if the loſs had happened before it iſſued. 434, 435

A policy was made for one year from the day of the date thereof: the policy was dated 3d *Sept.* 1697. The perſon died on the 3d *Sept.* 1698, about one

one o'clock in the morning; and the insurer was held liable. *Page* 436
It is now usual to insert in the policy "the first and last days "included." *ibid*
Fraud equally vitiates policies on live, as in the case of marine insurances. 437
Where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health, for it never can mean that he is free from the seeds of disorder. *ibid*
If the person whose life was insured, laboured under a particular infirmity, if it be proved by medical men, that, in their judgment, it did not at all contribute to his death, the warranty of health has been fully complied with, and the insurer is liable. 438
If the person, whose life was insured, should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium. 440

London Assurance Company.

Erected by royal charter, authorized by stat. 6 Geo. 1. ch. 18. 7, 8, 9
This, and the Royal Exchange Assurance Company, are the only societies which may insure. 8
The privileges of the *South Sea* and *East India* Companies preserved. *ibid*
This company has a common seal. 6
It rejects the words "*or the ship* "*be stranded*," in the memorandum at the foot of the policy. 21
This company, when sued in an action of debt, may plead generally, that *they owe nothing*, and give the special matter in evidence. *Page* 397
So when sued in *covenant*, they may plead generally, "that *they* "*have not broke their covenant*." *ibid*
This company obtained his majesty's charter to enable them to make insurances upon lives. 430

Loss.

The loss must be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insured to recover. 56
Loss by Perils of the Sea, vide *Perils of the Sea.*
Loss by Capture, vide *Capture.*
Loss by Detention, vide *Detention.*
Loss by Barratry, vide *Barratry.*
Of an Average or partial Loss, vide *Partial Losses.*

Market.

THE rise or fall of the market is a charge, which never falls upon the insurer. 98, 104, 109

Master of Ships.

The name of the *master* must be inserted in the policy. 19
The master's cloaths are not included under a general insurance *on goods.* 21
Whatever is done by the master of the ship in the usual course of the voyage, necessarily *et ex justa causa*, though a loss happen thereon, the underwriter shall be answerable. 30
A *mistake* of the master cannot be called a *peril of the sea.* 62
Of barratry of the master, see barratry.

The

The wearing apparel of the maſter is excepted from the allowand of ſalvage. *Page* 140

Memorandum.

The memorandum at the foot of the policy exempts the underwriters from partial loſſes not amounting to 3 *per cent.* unleſs it ariſe from a general average, or *the ſtranding of the ſhip.* Theſe laſt words in Italicks are not uſed by the two inſurance companies. 20, 21, 101

It alſo provides, that the underwriters will not anſwer for any partial loſs on corn, fiſh, ſalt, fruit, or ſeed, unleſs occaſioned by a general average or the ſtranding of the ſhip, nor are they liable for any partial loſs on ſugar, tobacco, hemp, flax, hides, and ſkins, under 5 *per cent.* 20

If three cheſts of goods out of 101 be wholly ſpoiled, will the underwriter be liable? 102

Corn is a general expreſſion, and has been held to include *peas* and *beans.* 112

The word Salt has been held not to include Salt petre. 113

It has been held that the underwriters are not anſwerable, within that part of the memorandum, which exempts them from all partial loſſes to corn, fiſh, ſalt, fruit, or ſeed, as long as the commodity ſpecifically remains, altho' wholly unfit for uſe. 112

This was held with regard to a cargo of *wheat*, partially damaged by a ſtorm. 113

A cargo of *fiſh* arrived, but was ſtinking, and wholly unfit for uſe, the inſurer was held not to be liable. 114

A cargo of *peas* arrived at the port of deſtination; but they were ſo much damaged, that the produce was three fourths leſs than the freight; the inſurer was held to be diſcharged. *Page* 116

Miſdemeanor.

Any perſon, except thoſe mentioned in the ſtat. 12 *Anne*, ſtat. 2. ch. 18. entering a ſhip in diſtreſs, without leave of the ſuperior officer, or of the officer of the cuſtoms, or moleſting or hindering them in the preſervation of the ſhip, or defacing the marks of the goods on board, ſhall make double ſatisfaction, or be ſent to the houſe of correction for 12 months 134

If goods ſtolen from ſuch ſhip ſhall be found on any perſon, they ſhall be delivered to the true owner, or ſuch perſon ſhall pay treble the value. *ibid*

Miſſing ſhip.

A ſhip, that has been miſſing for a conſiderable time, ſhall be conſidered as having foundered at ſea. 63

In practice, this time has been generally fixed to ſix months after the ſhip's departure for any part of *Europe*, or twelve months, if for a greater diſtance. 64

Miſrepreſentation, Vide title *fraud*, &c.

Name.

THE name of the inſured muſt be inſerted in the policy; or the name of the agent effecting it, *as agent*, 15, 16, 17

It is now ſufficient to inſert the name of the perſon actually intereſted, or that of the conſignor or conſignee of the goods or the names of thoſe who receive the orders to inſure, or who ſhall give the orders to effect the inſurance. 18, 19

The name of the ſhip and maſter muſt

must be inserted in the policy.
Page 19
But the ship may be changed in the voyage, if necessity require it.
20

Navigation.

Insurances which tend to a breach of the navigation acts are void.
250, to 254

Neutrality.

A neutral ship is not obliged to stop to be searched; the searcher does it at his peril, it is a case of improper detention, for the costs of which the insurer is liable.
79, 80
If a man warrant the property to be neutral, and it is not, the policy is void *ab initio* 350
In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury that they were not neutral. The court therefore though the loss happened by storm, and not by capture, declared that the contract was void. *ibid*
If the ship and property are neutral, when the risk commences, this is a sufficient compliance with a warranty of neutrality.
351, 353
The insurer takes upon himself the risk of war and peace, 352
If the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable. 353
For the effect of the sentence of a foreign court of Admiralty upon the question of neutrality, see *Admiralty*.

Oleron (laws of)

AN account of them. Introd. xxvii
They do not treat of insurances. Introd. xxix

Open Policy.

In an *open* policy, the value of the property is not mentioned; but must be proved at the trial.
Page 1, 103

Opinion, See *Evidence*.

Partial Losses.

AVERAGE loss, in policies of insurance, means a particular partial loss. 99
It is less ambiguous, to call it a *partial*, than an average loss. 99
Partial loss, when applied to the ship, means a damage, which she may have sustained in the course of the voyage from some of the perils mentioned in the policy: when to the cargo, it means the damage which the goods have suffered from storm, &c. though the whole or the greater part thereof may arrive in port. 101
These losses fall upon the underwriter, if they amount to 3*l. per cent.* 101, 112
But if a loss, arising from *a general average* should be under 3*l. per cent.* till the underwriter is liable. 101
Suppose 101 chests of goods be shipped, and three of them be wholly spoiled; *Qu.* will the underwriter be liable? 102
In case of a partial loss, the value of the policy can be no guide to ascertain the damage, but it becomes the subject of proof as in case of an open policy. 103
When goods are partially damaged the underwriter must pay the owner such proportion of the prime cost or value in the policy, as corresponds with the proportion of diminution in value occasioned by the damage. *ibid*
The proportion is ascertained in the way

way: where an entire thing, as one hogſhead of ſugar, happens to be ſpoiled, if you can fix whether it be a third or a fourth worſe, then the damage is aſcertained. *Page* 104. 108

This can only be done at the port of delivery, where the whole damage is known, and the voyage is completed. 104

Whether the price of the commodity be high or low, it equally aſcertains the proportion of damage. This proportion the underwriter muſt pay, not of the value for which it ſold, or the market price of the commodity; but of the value ſtated in the policy. 104

When it is an open policy, the invoice of the original coſt, with the addition of all charges, and the premium of inſurance, ſhall be the ground of the computation. *ibid*

But whether the goods arrive at a good or bad market, it is immaterial to the inſurer. *ibid*

The true way of eſtimating the loſs is to take the value of the commodity at the fair invoice price *ibid*

Theſe rules can only apply to caſes where there is a ſpecific deſcription of goods. 111

Where the property is of various kinds, an account muſt be taken of the value of the whole, and a proportion of that as the amount of the goods loſt. *ibid*

Q. Whether goods partially damaged may be opened, except in the preſence of the inſurers or their agents? *ibid*

No loſs ſhall be deemed total ſo as to charge the inſurers within the meaning of that part of the memorandum, which exempts them from partial loſſes happening to corn, fiſh, ſalt, fruit, flour, and ſeed, as long as the commodity ſpecifically remains, though perhaps wholly unfit for uſe. *Page* 112

This was held with reſpect to a cargo of wheat, which was partially damaged in a ſtorm. 113

The ſame with reſpect to a cargo of fiſh, which was ſtinking and of no value when examined. 114

A cargo of *peas* was ſo much damaged, that the produce was three fourths leſs than the *freight*; but as it in fact arrived at the port of deſtination, the under-writer was held not to be liable. 116

In policies upon lives, there cannot, from the nature of the event, be a partial loſs. 434

But there may in inſurances againſt fire. 449

Of Adjuſting a partial Loſs, ſee *Adjuſtment*.

Payment of Money into Court.

The underwriters were empowered by ſtatute to pay money into court upon any diſpute; and then the inſured proceed at their peril. 403

Perils of the Sea.

Every accident, happening by the violence of wind or waves, by thunder and lightning, by driving againſt rocks for by the ſtranding of the ſhip, may be conſidered as a peril of the ſea. 61

For ſuch loſſes the underwriter is anſwerable. *ibid*

An action was brought to recover the value of certain ſlaves inſured by the policy. The facts were that the captain miſſed the iſland, for which he was bound and their water running ſhort, ſome of the ſlaves were thrown overboard, to preſerve the reſt; and the declaration ſtated the loſs to have happened

pened by perils of the ſea, But it was held that *the miſtake* of the captain could not be called *a peril of the ſea.* *Page* 62

A ſhip, which is never heard of, after her departure, ſhall be preſumed to have periſhed at ſea. 63

This was held in an action on a policy upon the ſhip from *North Carolina* to *London*; and the loſs was ſtated to be by ſinking at ſea; the evidence to ſupport this averment was that after ſailing from port ſhe had never been heard of. *ibid*

The ſame was held in a caſe, where a ſhip had been captured and ranſomed at ſea, but was never afterwards heard of, and never arrived at her port of deſtination. 63

In *England* no time is fixed, within which payment of a loſs may be demanded from the underwriter, in caſe the ſhip is not heard of. 64

A practice, however, prevails among merchants, that a ſhip ſhall be deemed loſt, if not heard of within ſix months after her departure for any part of *Europe*, or within twelve, if for a greater diſtance. *ibid*

Petty Average.

Conſiſts of ſuch charges, as the maſter is obliged to pay by cuſtom, for the benefit of the ſhip and cargo; ſuch as pilotage, beaconage, &c. 100

Theſe never fall upon the underwriter. *ibid*

Another ſenſe, in which this word is underſtood, is when we ſpeak of a ſmall duty, which merchants, who ſend goods in the ſhips of other men, pay to the maſter, over and above the freight, for his care and attention. *Page* 100

This is a charge which never falls upon the underwriter. 100

Pirates.

The underwriter, by expreſs words in the policy, undertakes to indemnify againſt the attacks of pirates. 61

Plea. See *Declaration.*

Policy.

A policy is the inſtrument by which the inſurance is effected. 1

Policies are of two kinds; *valued* and *open* policies: the difference between them. 1

They are only ſimple contracts; but of great credit. *ibid*

Cannot be altered when once they are ſigned. *ibid*

Unleſs there be ſome written document to ſhew that the meaning of the parties was miſtaken; or unleſs they be altered by *conſent.* 2, 3

A policy is a ſpecies of property for which trover will lie at the inſtance of the inſured, if it be *wrongfully* withheld from him. 4

The written clauſes in a policy will controul the printed words. 5

The form of the policy now uſed is two hundred years old. 15

Very irregular and confuſed, and often ambiguous. *ibid*

There are nine requiſites of a policy. *ibid*

The name of the perſon inſured. This is regulated by ſtat. 25 *Geo.* 3. c. 44. and 28 *Geo.* 3. c. 56. 15, 18

Upon the former act it has been held, that if any agent effects a policy for the principal reſiding abroad, his name muſt be inſerted in the policy *as agent.* 16

Q. When the principal reſides abroad

a broad, must not the agent live in *England?* *Page* 16, 17
The names of the ship and master, unless the insurance be general; "*on any ship or ships.*" 19
Whether the insurance be made on ships, goods, or merchandizes. 20
As to the memorandum at the foot of the policy, see *Memorandum.*
A policy *on goods* generally does not include goods lashed on deck, the captain's cloaths, or the ship's provisions. 21
A policy must contain the name of the place at which the goods are laden, and to which they are bound. 22
A policy from L. to ——— is void. 22
When the risk commences, and when it ends. On the goods it usually begins from the loading and continues till they are safely landed: on the ship from her beginning to load at *A.* and continues till she arrive at the port of destination, and be there moored 24 hours. *ibid*
The various perils against which the underwriter insures. 24
Q. Whether the underwriter is liable for thefts committed by the people on board; and for loss arising from bad stowage, &c. *ibid*
The policy is frequently made with the words, *lost or not lost,* in it; which add greatly to the risk. 25
The policy must contain the premium or consideration for the risk. 26
The day, month, and year, on which the policy was executed, must be inserted. 27
The policy must be duly stamped. 28
When an insurance is made, a policy must be made out in three days, under a penalty of 100*l.* Promissory notes for insurances are void. *Page* 28

Vide *Stamp.*

As to the Construction of the Policy see *Construction.*
Of Policies on East India Voyages see title *East India Voyages.*
Of Policies upon gaming or wagering Contracts, See title *Wager-Policies*

Practice.

Account of the modern improvements in the practice and proceedings upon policies of insurance. Introd. xliii

Premium.

The premium is the foundation of the promise, or *assumpsit.* 26
It is in the policy acknowledged by the insurer to be received at the time of underwriting. *ibid*
Q. Whether after this the insurer could maintain an action against the *insured himself* for the premiums. *ibid*
In practice, the insured generally act by a broker, and by the custom, an action may be maintained against him, notwithstanding the acknowledgement in the policy. *ibid*
The broker may also maintain an action against the assured for premiums paid on his account. 27

See *Fraud.*

When the Premium shall be returned, see title *Return of Premium.*

Prohibited Goods.

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. 244
This rule prevails, whether the insurer did or did not know, that the subject of the insurance was a prohibited commodity. *ibid*
The parliament of *England* has passed a law, inflicting a penalty of

500*l.* on the insurer, who should by way of insurance, procure the importation of prohibited goods; and a like penalty on the insured. *Page* 245

By a subsequent law, the importation of any foreign alamodes or lustrings, by way of insurance or otherwise, without paying the duties, is expressly prohibited. 247

Whoever, by way of insurance, undertakes to export wool from *England* to parts beyond the seas, shall be liable to pay 500*l.* 248

The like penalty is inflicted on the insured. *ibid*

Besides which all insurances on woollen goods are declared void. 249

Persons making such insurances on wool, &c. are liable for the first offence to a fine of 50*l.* and six months solitary imprisonment The same penalty on the insured: and the insurance is void. *ibid*

Insurances made to protect smuggled goods are void. 250

Insurances, which tend to a breach of the navigation acts, are void. 250 to 254

Insurances on goods prohibited by royal proclamation in time of war are void. 254

Goods, which from their nature are contraband, enumerated. 255

Insurances upon goods, the exportation or importation of which are prohibited only by the revenue laws of other countries, are valid in *England*. 256

The opinion of foreign writers upon this question, considered. 257, 258

Promissory Notes.

Notes for insurance are void 28

Proof. See *Evidence.*

Provisions of a Ship.

Are not included under a general insurance on *goods.* *Page* 21

Provisions expended during a detention to repair, or detention by an embargo, cannot be recovered against the insurer on the *ship or goods.* 52, 54

Whether they fall into a general average? 125, 126

Ship's provisions do not contribute to a general average. 127

Re-Assurance.

RE-ASSURANCE is a contract, which the first underwriter enters into, in order to relieve himself from those risks which he has previously undertaken by throwing them upon other underwriters, who are called Re-assurers. 276

This species of contract is countenanced in most parts of *Europe.* *ibid*

The opinions of foreign writers upon re-assurance stated, *ibid*

They were admitted in *England* till the 19 *Geo* 2. *c.* 37. *s.* 4. which declares it to be unlawful to make re-assurance, unless the assurer should be insolvent, become a bankrupt, or die; in either of which cases, such assurer, executors, administrators, or assigns, might make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance. 277

The reasons for these exceptions as to bankrupts and deceased underwriters, stated. *ibid*

Re assurances on *foreign* ships are prohibited by this act, except in the three instances mentioned in the statute. 279

In *France*, and other countries, it is allowed to the insured to insure the

the ſolvency of the underwriter *Page* 280
Not allowed in *England*. *ibid*
Diſtinction between a re-aſſurance and a double inſurance. *ibid*
Re-capture. See *Capture.*
Regiſtration.
The law of *England* does not require that a policy ſhould be regiſtered. 29
Repreſentation. See title *Fraud &c.*
Requiſites of a Policy.
The name of the perſon inſured. 15
The name of the ſhip and maſter. 19
Whether they are ſhips, goods, or merchandizes, on which the inſurance is made. 20
The name of the place at which the goods are laden, and to which they are bound. 22
The time when the riſk commences, and when it ends. *ibid*
The various perils to which the underwriters are expoſed. 24
The conſideration or premium for the hazard run. 26
The time when the policy was executed. 27
That the policy be duly ſtamped. 28
Reſpondentia. See *Bottomry*
Return of Premium.
The queſtion, whether the premium is to be returned by the underwriter, where the inſured has been guilty of fraud, conſidered. 215
The ordinances of foreign ſtates declare, for the moſt part, that it ſhall *ibid*
In *England* there has been no legiſlative regulation; and the courts of juſtice have not, as yet, adopted any general rule upon the ſubject. 216
In two or three inſtances, where the underwriters have been relieved in Chancery, from the payment of the ſums inſured on account of fraud, the decree has directed the premium to be returned. *Page* 216
The queſtion came on to be conſidered in the King's Bench; but the trial being had under a decree of the Court of Chancery, and the inſurer having there made an offer of returning the premium, the court of King's Bench conſidered this offer in the ſame light as if he had paid the money into court; and therefore the queſtion remained undecided. 217
But in a caſe when the fraud was of a very groſs and heinous nature Lord *Mansfield* told the jury, that the premium ſhould not be reſtored to the inſured. 218
It is clear that if the underwriter has been guilty of fraud, an action *lies* againſt him, at the ſuit of the inſured, to recover the premium. *ibid*
In caſes of deviation the premium is not to be returned. 317
Where property has been inſured to a larger amount than the real value, the inſurer ſhall return the overplus premium. 367
If goods are inſured to come in certain ſhips from abroad, but are not in fact ſhipped, the premium ſhall be returned. *ibid*
If the ſhip be arrived before the policy is made, the inſurer on being apprized of it, and the inſured being ignorant of it, he is entitled to have his premium reſtored. *ibid*
But if both parties are ignorant of the arrival, and the policy be *loſt or not loſt*, it ſhould ſeem the underwriter ought to retain it. *ibid*
Clauſes are frequently inſerted by the parties, that upon the happening of a certain event, there ſhall be a return of premium. *ibid*

If the ſhip or property inſured was never brought within the terms of the contract, ſo that the inſurer never ran any riſk, the premium muſt be returned *Page* 367

A clauſe was inſerted that 8*l. per cent.* of the premium ſhould be returned, if the ſhip ſailed from any of the *Weſt India* Iſlands with convoy for the voyage *and arrives.* The court held, that the arrival of the ſhip, whether with, or without convoy, entitled the party to a return of the premium ſtipulated. 369

Whether the cauſe of the riſk not being run is attributable to the *fault, will,* or *pleaſure* of the inſured, the premium is to be returned. 371, 377

When a policy is void as a wager policy, the court will not allow the inſured to recover back the premium. 373, 375

Where the riſk has *once* commenced, there ſhall be no apportionment or return of premium afterwards. 377

But if there are two diſtinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the uſage of trade, and only one of the two voyages was made, the premium ſhall be returned on the other, though both are contained in one policy. *ibid*

Thus held in an inſurance " at and " from *London* to *Halifax*, war- " ranted to depart with convoy " from *Portſmouth*," when the ſhip arrived at *Portſmouth*, the convoy was gone. The premium for the voyage from *Portſmouth* to *Halifax* was returned. 378

A ſhip was inſured for twelve months, at 9*l. per cent.* warranted free from *American* captures. The ſhip was taken within two months by the *Americans*; but there ſhall be no return of premium, becauſe the contract was entire; the premium was a groſs ſum ſtipulated and paid for twelve months. *Page* 380

So alſo it was held where a ſhip was inſured for twelve months was taken at the end of two, though the whole premium of 18*l.* was acknowledged to be received *at the rate of* 15*s. per month*; for that is only a mode of computing the groſs ſum. 384

When the contract is entire, whether it be for a ſpecified time, or for a voyage, there ſhall be no apportionment or return, if the riſk has once commenced. 386

Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home upon the happening or not happening of which the riſk is to end, nor any uſage eſtabliſhed upon ſuch voyage; though there be ſeveral diſtinct ports, at which the ſhip is to ſtop, yet the voyage is one, and no part of the premium ſhall be recoverable. *ibid*

It was ſo held in a caſe, where a ſhip was inſured, " at and from " *Honfleur* to the coaſt of *Angola* " during her ſtay, and trade there " at and from thence to her port " or ports of diſcharge in *St. Do-* " *mingo*, and at and from *St. Do-* " *mingo* back to *Honfleur*," and the policy was at an end by her deviation, before ſhe arrived at *St. Domingo*; and conſequently for the latter part of the voyage inſured, the inſurer ran no riſk. 386

It was alſo ſo held where a ſhip was inſured " *at* and *from Ja-*

maica

" *maica*, warranted to ſail on or " before the firſt of *Auguſt*, to " return eight *per cent.* if ſhe " ſailed with convoy." The ſhip did not ſail till *September*. There ſhall be no return upon the warranty of the time of ſailing; for the court cannot make a diſtinction between the riſk *at* and the riſk *from*. *Page* 389
It is otherwiſe, if the jury find an expreſs uſage upon the ſubject of return of premium. 390
Indeed, it ſeems that there never has been an apportionment, unleſs there be ſomething like an uſage found to direct the judgment of the court. 392
If a perſon whoſe life is inſured, ſhould commit ſuicide, or be publicly executed the next day after the riſk commences, there can be no return of premium. 440
There can be no return of premium in inſurances againſt fire. 456

Rhodians.

Some account of their maritime regulations. Introd. iv
Suppoſed to have been unacquainted with the contract of inſurance. Introd. vi
They were acquainted with the contract of bottomry. 415

Riſk.

The riſk on the ſhip in general commences from her beginning to load, and continues till ſhe has moored twenty-four hours in ſafety. On goods from the loading till they are ſafely landed, which includes the carriage to the ſhore in the ſhip's boats, but not in thoſe of the owner of the goods. 23, 24
The riſks which the underwriters take upon themſelves. 24
Q. Whether theft by the people on board be of the number? 24, 25

Romans.

Some account of their commerce. Introd. x
They were unacquainted with inſurances. Introd. xii
Contrary opinions ſtated and controverted. Introd. xv

Royal Exchange Aſſurance Company.

Erected by royal charter, authoriſed by ſtat. 6. *Geo.* 1ſt. ch. 18. *P.* 7
This and the *London* Aſſurance Company, are the only *ſocieties* which may make inſurances. 7, 8
The privileges of the *South Sea*, and *Eaſt India* Companies preſerved. 8
This company rejects the words " *or the ſhip be ſtranded*" in the memorandum at the foot of the policy. 21
This ſociety, when ſued *in an action of debt*, may plead generally *that they owe nothing*, or in *covenant that they have not broke it*, and in both caſes may give the ſpecial matter in evidence. 397
This company obtained his majeſty's charter to enable them to make inſurances on lives. 430

Sailing (Warranty of)

IF a man warrant to ſail on a particular day, and do not, the inſurer is diſcharged. 325
This rule holds, though the ſhip be delayed for the beſt and wiſeſt reaſons, or even though ſhe be detained by force. 325
Thus where a ſhip was inſured " at and from *Jamaica*, warranted to ſail on or before the 26th of *July*, it appeared that the ſhip was ready and would have ſailed on the 25th, *if ſhe had not been reſtrained by the order and command of* Sir *Baſil Keith*, governor of *Jamaica*

maica, and *detained beyond the day*. The inſurer was diſcharged. *Page* 325
This rule is adopted by foreign writers. 326
If the warranty be to ſail *after* a ſpecifick day, and the ſhip ſail before, the policy is equally avoided as in the former caſe. 326
Upon a warranty to ſail on or before a particular day, if the ſhip ſail before the day from her port of loading *with all her cargo and clearances on board*, to the uſual place of rendezvous at another part of the iſland merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo beyond the day. 327
But if her cargo was not complete, it would not be a commencement of the voyage. *ibid*
The ſame doctrines prevail, even though a condition be inſerted in one of the ſhip's clearances; *that ſhe ſhould paſs by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. 332
Thus alſo where an embargo was actually publiſhed before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a proteſt, and knowingly ſent his ſhip into the embargo; yet, as he ſwore, that he believed the embargo was to be taken off, the underwriter was held liable. 337
What ſhall be a ſailing from the port of *London*. Q. 338

Sailors.

Inſurances on the wages of ſailors are forbidden. 12
But the captain may inſure goods which he has on board, or his ſhare in the ſhip, if he be a part owner. *Page* 13
The wearing apparel of the ſailors is excepted from the allowance of Salvage. 140

Salt.

The word *Salt* uſed in the memorandum of a policy of inſurance has been held not to include *Salt-petre*. 113

Salvage.

Salvage is an allowance made for ſaving a ſhip or goods, or both from the dangers of the ſeas, fire, pirates, or enemies; it is alſo uſed ſometimes to ſignify the thing itſelf which is ſaved. But the former is the ſenſe in which it is here uſed. 131
In an action of trover, it has been held that the defendants might retain the goods till payment of ſalvage, as well as a taylor the cloaths which he has made. *ibid*
When a ſhip has been wrecked, the law of *England* by various ſtatutes declares, that *reaſonable* ſalvage only ſhall be allowed, to thoſe who ſave the ſhip or any of the goods; and what ſhall be a reaſonable allowance muſt be aſcertained by three juſtices of the peace. 132 to 138
If any prize taken from the enemy ſhall appear to have belonged to any of his majeſty's ſubjects, it ſhall be reſtored to the former owner, upon his paying in lieu of ſalvage, one eighth of the value, if retaken by one of his majeſty's ſhips, but if retaken by a privateer, before it has been 24 hours in poſſeſſion of the enemy, the owner muſt pay one eighth of the value; if above 24 and under 48 hours, one fifth; if above 48 and under 96 hours, a third part there-

thereof, and if above 96 hour, a moiety thereof: or if the ſhip ſo retaken ſhall have been fitted out by the enemy as a man of war, the owner ſhall pay a moiety of the ſalvage. *Page.* 72, 139

Wearing apparel of the maſter and ſeamen are always excepted from the allowance of ſalvage. 140

The valuation of a ſhip and cargo in order to aſcertain the rate of ſalvage, may be determined by the policies of inſurance made on them reſpectively; if there be no reaſon to ſuſpect they are undervalued. If there be no policy, the real value muſt be proved by invoices, &c. *ibid*

Underwriters by their policy expreſsly undertake to bear all expences of ſalvage. *ibid*

In order to entitle the inſured to recover expences of ſalvage, it is not neceſſary to ſtate them in the declaration, as a ſpecial breach of the policy. 141

Thus in a declaration on a policy on goods, it ſtated, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expences of ſalvage. 141

But if the inſurer pay to the inſured ſuch expences, and from particular circumſtances, the loſs be repaired by unexpected means the inſurer ſhall ſtand in the place of the inſured, and receive the ſum thus paid to atone for the loſs. *ibid*

Where the ſalvage is high, the other expences are great, and the object of the voyage is defeated, the inſured is allowed to abandon to the inſurer, and call upon him to contribute for a total loſs. See *Abandonment.*

There is neither average nor *ſalvage* upon a bottomry bond in England. *Page* 422

Aliter, in France and Denmark. 423

Seaworthineſs.

Every ſhip inſured muſt, at the time of the inſurance, be able to perform the voyage, unleſs ſome external accident ſhould happen, and if ſhe have a latent defect wholly unknown to the parties, that will vacate the contract, and the inſurers are diſcharged. 220

This ariſes from a tacit and implied warranty, that the ſhip ſhall be in a condition to perform the voyage. 221

But the inſured ought to know whether ſhe was ſeaworthy or not at the time ſhe ſet out upon her voyage; yet if it can be ſhewn that the decay to which the loſs is attributable, did not commence till a period ſubſequent to the inſurance, the underwriter will be liable, if ſhe ſhould be loſt a few days after her departure. *ibid*

The whole doctrine of ſeaworthineſs to be collected from the caſe of the *Mills* Frigate, which is fully ſtated from page 221 to 228

The doctrine of ſeaworthineſs, as eſtabliſhed by the law of *England*, is conſonant to the laws of all the commercial and maritime ſtates in *Europe.* 229

Where the ſhip is not ſeaworthy, the policy is void, as well where the inſurance is upon the goods, as when it is upon the ſhip itſelf. 231

Sentence.

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reign courts considered. 423, 424
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Ship.
The name of the ship must be inserted in the policy. 19
But if necessity require it, the ship may be changed in the course of the voyage, and the insurer *on the cargo* continues liable. 20, 290
Sometimes, there are insurances on "any ship or ships." 19
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An insurance upon a smuggling voyage, prohibited by the revenue laws of this country is void: *aliter*, if merely against the revenue laws of a foreign state. 236
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Every policy of insurance, not exceeding 100*l.* must have a six shilling stamp, and above that sum a stamp of eleven shillings. 29
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21. *c.* 19. *p.* 435.
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7 *c.* 8. *p.* 252.
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8. *c.* 25. *ibid.*
14. *c.* 48. *p.* 15. 431.
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Stowage.

For bad ſtowage of the cargo the inſurer is not anſwerable. *Page* 24

Thieves.

Q. WHETHER the inſurers are anſwerable for theſts committed by the people on board the ſhip? 25

Time

In inſurances upon time, the court in their conſtruction of them, has always attended to the meaning of the parties, and a liberal expoſition of the words of the contract. 58

A policy was made on a letter of marque; at and from *Liverpool* to *Antigua*, *with liberty to cruiſe ſix weeks*; the court held that this meant ſix *ſucceſſive* weeks, and not a deſultory cruiſing for ſix weeks at any time. 58, 59

Total Loſs.

A total loſs in inſurances, does not always mean that the property inſured is irrecoverably loſt or gone; but that, by ſome of the perils mentioned in the policy, it is in ſuch a condition as to be of little uſe or value to the inſured, and to juſtify him in abandoning his right to the inſurer, and calling upon him to pay the whole of his inſurance. 98, 143

In a total loſs, properly ſo called, the prime coſt of the property inſured, or the value in the policy muſt be paid by the underwriter *Page* 98

Where the policy is a valued one, it is only neceſſary to prove that the goods were on board at the time of the loſs. 103

Where it is an open policy, the value muſt alſo be proved. *ib.*

The inſured may call upon the underwriter for a total loſs, if the voyage be abſolutely loſt, or not worth purſuing; if the ſalvage amount to half the value; or if further expence be neceſſary, and the underwriter will not engage at all events to bear that expence. 145, 152, 159

A ſhip was taken by a *Spaniſh* ſhip, retaken by an *Engliſh* privateer and carried into *Boſton*, where, as no perſon appeared to give ſecurity for the ſalvage, ſhe was ſold; the recaptors had their moiety, and the overplus remained with the officers of the court of Admiralty. The owners were entitled to abandon and to recover for a total loſs. 146

A ſhip was taken by the *French*, remained with them eight days, and was retaken; the maſter, mates, and ſailors, except a landman and an apprentice, had been taken out and carried to *France*. Before the capture, the ſhip had been ſeparated from her convoy, and was ſo far diſabled by ſtorm, as to be incapable of proceeding on her deſtined voyage, without going into port to refit. Part of the cargo was thrown overboard in the ſtorm, and the reſt ſpoiled while the ſhip lay at *Milford Haven*. In actions upon two policies, one on the ſhip, and the other on the cargo, it was held

held that this was a total loſs, ſo as to entitle the owner to abandon. *Page* 148

A ſhip, bound from *Montſerrat* to *London*, was captured, and the captain, crew, rigging, and part of the cargo, which was ſugar, were taken away. She was retaken and carried into *New-York*, where the captain alſo arrived. Upon taking poſſeſſion, he found that part of the cargo which had been left was waſhed overboard: that 57 hogſheads of what remained were damaged, and that the ſhip was in ſuch a ſtate that ſhe could not be repaired, without unloading her entirely. The owners had no ſtorehouſes at *New York*; nor were any ſailors to be had. The ſalvage came to forty hogſheads of ſugar; and if the ſhip had been repaired, it would have exceeded the freight by 100*l.* There was an embargo laid on all ſhips till *December*, and the ſhip ſhould have arrived in *London* the *July* preceding. The captain, upon the advice of his friends, ſold the cargo, and was paid for it: he agreed alſo to ſell the ſhip; but the perſon who contracted for it ran away, upon which the captain left her in a creek, and returned to *England*. This was a total loſs, and the owners had a right to abandon. 152

The right to abandon muſt depend on the nature of the caſe at the time of the action brought, or at the time of the offer to abandon; and therefore if at the time the advice is received of the loſs, it appear that the peril is over and the thing is in ſafety, the inſured has no right to abandon. 146, 158

Thus in a caſe where there was a capture and recapture, and it was ſtated that at the time of the offer to abandon, the ſhip was ſafe in port, and had ſuſtained no damage, the court held that the inſured had no right to abandon. *Page* 157

But if the underwriter pay for a total loſs, and it afterwards turn out to be but partial, the inſured ſhall not be obliged to refund; but the inſurer ſhall ſtand in his place for the benefit of ſalvage. 164

A ſhip was inſured from *Wyburg* to *Lynn*, at which place ſhe arrived: the jury found that the ſhip was not worth repairing; but the damage ſuſtained in the voyage inſured did not exceed 48*l. per cent.* By the court, the jury have precluded us from ſaying that this is a total loſs; and where neither the thing inſured nor the voyage is loſt, the inſured cannot abandon. *ibid*

A ſhip was inſured for ſix months in port or at ſea; ſhe was in government ſervice, bound from *Cork* to *Quebec*. She arrived at *Quebec*, but the ſeaſon being too far advanced, before ſhe was ready to return, ſhe was removed into the baſon; but on the 19th of *November* ſhe was driven from thence by a field of ice, and damaged by running on the rocks. The condition of the ſhip could not be examined till *April* following, after the expiration of the policy. She was then found to be bulged and much injured, but not thought irreparably ſo. In the progreſs of the repair, difficulties aroſe for want of materials, and the captain, after conſultation, ſold her. This was held to be but a partial loſs in *November*. 166

But in an inſurance on ſhip, cargo and freight, at and from *Tortola* to *London*, warranted free of particular

ticular average, it appeared that on the 1ſt of *Auguſt* the whole fleet got under way, but not being able to get clear of the iſlands, they anchored, and next day got clear. About 10 o'clock on the 2d of *Auguſt*, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain, and make water ſo faſt, that the crew were obliged to work both pumps: on the 3d the captain made a ſignal of diſtreſs, and returned to *Tortola*. A ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo; that ſhe could not be repaired in any of the *Engliſh Weſt India Iſlands*; many of the ſugars in the bilge and lower tier were waſhed out, and ſeveral of the caſks broke and in bad order. This was held to be a total loſs, the voyage being entirely defeated. *Page* 168

Trover.

Trover will lie for a policy, at the ſuit of the inſured, if it be wrongfully withheld from him. 4

In trover, a defendant may in evidence juſtify the retainer of the goods till payment of ſalvage. 131

Underwriter See *Inſurer.*

Uſage.

IN the conſtruction of policies no rule has been more frequently followed than *the uſage of trade* with reſpect to the voyage inſured. 30

Upon an inſurance on goods to *Labrador*, and till they were ſafely landed, the inſurers were held liable, on account of the uſage, although the loſs did not happen till a month after the ſhip's arrival, the crew having been all that time employed in fiſhing, and never having unloaded the goods but at leiſure times. *Page* 44

As to the Uſage in Eaſt India Voyages; ſee title *Eaſt India Voyages.*

Valuation.

IN a total loſs, the under-writer muſt pay the amount of the prime coſt of the property inſured, or the value mentioned in the policy. 98

So if part of the cargo, capable of a diſtinct valuation be totally loſt, the inſurer muſt pay the whole prime coſt of the part ſo loſt. *ibid*

In caſe of a partial loſs, when the policy is valued, the rule for eſtimating the damage, is to aſcertain whether the goods be a third or fourth worſe, when they arrive at the port of delivery; and then the underwriter muſt pay a third or fourth of the value in the policy without regard to the riſe or fall of the market. 103, 107

When the valuation is not ſtated in the policy, the invoice of the coſt, with the addition of all charges, and the premium of inſurance, is the foundation upon which the loſs ſhall be computed. 104

Valued Policy.

In *valued* policies, the value of the property inſured, is inſerted at the time of making the contract, and upon a trial, it is not neceſſary to go into the proof of the value, becauſe it is admitted by the policy. 1, 103

It is in ſuch a caſe only neceſſary to prove that the property was on board. *ibid*

Where the loſs is partial, the value in the policy can be no guide to aſcer-

aſcertain the damage; and it then muſt become a ſubject of proof, as in the caſe of an open policy. *Page* 1, 103

A valued policy is not a wager policy. 108

In a valued policy, it is only neceſſary to prove ſome intereſt to take it out of the ſtatute, 19 *Geo.* 2. *c.* 37 109

If uſed merely as a cover to a wager, ſuch an evaſion would not be allowed to defeat the ſtatute. 109, 266

After a judgment by default upon a *valued* policy, the plaintiff's title to recover is confeſſed, and the amount of the damage is fixed in the policy. 118, 266

Venice.

Origin and progreſs of that Republic. Introd. xxi

Void Policies.

The name of the perſon actually intereſted muſt be inſerted in the policy, or the name of the agent effecting it, *as agent*; otherwiſe the policy is void. 16

When the principal reſides abroad, the agent ſo effecting the policy muſt live in *England*. *Qu.* 16 17

But now it is ſufficient to inſert the name of the perſon actually intereſted, or that of the conſignor or conſignee of the goods, or the names of thoſe receiving the orders to inſure, or who ſhall give directions to effect the inſurance. 18, 19

Policies are rendered void *ab initio*, by the leaſt ſhadow of fraud or undue concealment. 174

Caſes of fraud with reſpect to policies, are liable to a three-fold diviſion. 1ſt, The *allegatio falſi.* 2d, The *ſuppreſſio veri*; 3d, Miſrepreſentation. The latter, tho' it happen by miſtake. if in a material part, will render the policy void as much as actual fraud. *P.* 175

See Title *Fraud.*

Every ſhip inſured muſt, at the time of the inſurance, be able to perform the voyage, unleſs ſome external accident ſhould happen; and if ſhe have a latent defect, wholly unknown to the parties, that will vacate the contract, and the inſurers are diſcharged. 220

See title *Sea-worthineſs.*

Whenever an inſurance is made on a voyage expreſsly prohibited by the common, ſtatute, or maritime law of this country, the policy is void. 232

See title *Illegal Voyages.*

All inſurances upon commodities, the importation or exportation of which is prohibited by law, are void. 244

See title *Prohibited Goods.*

By ſtatute 19 *Geo.* 2. *c.* 37. it was declared, that inſurances made on ſhips or goods, *intereſt or no intereſt*, or *without further proof of intereſt than the policy*, or by *way of gaming, or wagering*, or without benefit of ſalvage to the inſurer, ſhould be null and void. 262

See title *Wager Policies.*

It is, by the ſame ſtatute, declared unlawful to make re aſſurance, unleſs the firſt aſſurer ſhould be inſolvent, become a bankrupt, or die; in either of which caſes ſuch aſſurer, his executors, adminiſtrators and aſſigns, might make re-aſſurance to the amount before by him aſſured, expreſſing in the policy, that it is a re-aſſurance. 277

See title *Re-aſſurance.*

Wager-

Wager Policies.

IN wager-policies, the performance of the voyage in a reaſonable time and manner, and not the bare exiſtence of the ſhip or cargo, is the object of the inſurance. *Page* 259

Theſe policies being contradictory to the real nature of a policy, which is a contract of indemnity, were originally bad. *ibid*

They were introduced into *England* ſince the Revolution. 260

But the courts of juſtice looked on them with a jealous eye; and the courts of equity ſtill conſidered them as void. *ibid*

Thus a policy was decreed to be delivered up, where the inſured had no intereſt in the ſhip or cargo, except as a lender on bottomry, for which he had a bond. *ibid*

Where a man had inſured goods, by agreement valued at 600*l.* *and not to be obliged to prove any intereſt*, the Chancellor ordered the defendant to diſcover what goods he had on board. 261

The great diſtinction between *intereſt*, and wager-policies, was, that in the former, the inſured recovered for the loſs actually ſuſtained, whether it was total or partial loſs: in the latter, he could never recover, but for a total loſs. 261

By the ſtatute of 19 *Geo.* 2. *c.* 37. it was enacted, that inſurances made on ſhips or goods, *interest or no intereſt*, or *without further proof of intereſt, than the policy*, or *by way of gaming or wagering*, or *without benefit of ſalvage to the inſurer*, ſhould be null and void. 263

There is an exception for inſurances on private ſhips of war, fitted out ſolely to cruize againſt his majeſty's enemies. *Page* 263

It was alſo provided, that any merchandizes or effects from any ports or places in *Europe* or *America*, in the poſſeſſion of the Crowns of *Spain* or *Portugal* may be inſured in ſuch way or manner as if this act had not been made. *ibid*

This ſtatute has been frequently held not to extend to inſurances of foreign property, on foreign ſhips. 265

A *valued* policy is not a wager-policy; for he muſt prove ſome intereſt, although he need not prove the value of his intereſt. 266

If a valued policy were uſed merely as a cover to a wager, in order to evade the ſtatute, it would be void. *ibid*

An inſurance on the profits expected to ariſe from a cargo of moloſſes, belonging to the plaintiffs was held to be good; altho' there was a clauſe declaring, "that in caſe of loſs, the profits ſhould be valued at 1000*l.* without any other voucher than the policy." 267

An inſurance being made on any of the packet boats that ſhould ſail from *Liſbon* to *Falmouth*, or ſuch other port in *England*, as his majeſty ſhould direct for one year, upon any kind of goods, and merchandizes whatſoever. It was agreed that the goods and merchandizes ſhould be valued at the ſum inſured, without further proof of intereſt, than the policy. The court held that this was a policy of a mixed nature, and that the inſured might recover 268

Upon a joint capture by the army and navy, the officers and crew

of the ſhips, before condemnation, have an inſurable intereſt, by virtue of the prize-act, which uſually paſſes at the commencement of a war. *Page* 269

All inſurances, made by perſons having no intereſt in the event, about which they inſure, or without reference to any property on board, are merely wagers, and are void. 270

Thus where the defendant, in conſideration of 20*l.* paid by the plaintiff, undertook that the ſhip ſhould have her paſſage to *China*, that ſeaſon, or that he would pay 1000*l.* within one month after the arrival of the ſaid ſhip in the river *Thames*; the contract was held to be void, although the plaintiff had ſome goods on board. *ibid*

The plaintiffs had lent 26,000*l.* on bond, to a captain of an Eaſt-Indiaman, and inſured the ſhip and cargo to that amount, and *in caſe of loſs no other proof of intereſt to be required than the exhibition of the ſaid bond.* The contract was held to be void. 272

The third ſection of the ſtatute relative to inſurances, from any ports or places in *Europe* or *America*, in the poſſeſſion of *Spain* or *Portugal* is founded on the regulations of thoſe courts; but it is looſely worded. 274

Wages.

No maſter or owner of any merchant ſhip ſhall pay to any ſeaman beyond the ſeas, any money on account of wages, exceeding a half of the wages due, at the time of ſuch payment, till the ſhip ſhall return to *Great Britain* or *Ireland*. 12

Inſurances on the *wages* of ſeamen are forbidden. *ibid*

But the captain may inſure goods, which he has on board, or his ſhare in the ſhip, if he be a part owner. *Page* 13

Extraordinary wages paid to ſeamen during a detention to repair, or a detention by an embargo, cannot be recovered againſt the inſurers *on the ſhip, or cargo.* 52, 54

Q. Whether they are expences that will fall under the denomination of a general average 125, 126

Sailors wages are not liable to contribution in a caſe of general average. 127

Warranty.

A warranty, in a policy of inſurance, is a condition or a contingency, that a certain thing ſhall be done, or happen; and unleſs that is performed, there is no valid contract. 318

It is immaterial for what end the warranty is inſerted in the contract; but being inſerted it becomes a binding condition upon the inſured, and he muſt ſhew a *literal* compliance with it. *ibid*

It is no matter whether the loſs happen in conſequence of the breach of warranty or not; for the very meaning of inſerting a warranty is to preclude all enquiry about its materiality. 319

But as warranties are *ſtrictly* conſtrued in order to diſcharge the underwriter, ſo alſo they ſhall be ſtrictly conſtrued in favour of the inſured. 349

Thus the warranty was held to be ſufficiently complied with; where a ſhip *was warranted well this 9th day of December*; ſhe being well at ſix in the morning of the day, but was loſt at eight in the morning, and the policy ſigned between one and three in the afternoon. *ibid*

It is alſo immaterial to what cauſe the non-compliance is to be attributed; for altho' it might be owing to wiſe and prudential reaſons, the policy is avoided. *Page* 320

In this ſtrict and literal compliance with the terms of a warranty conſiſts the difference between a warranty and repreſentation. See title *Fraud*. *ibid*

In order to make *written* inſtructions binding as a warranty, they muſt appear on the face of, and make a part of the policy. 321

Even though a written paper be *wrapt up in the policy*, and ſhewn to the under-writers at the time of ſubſcribing; or even *though it be wafered to the policy*, it is not a warranty but a repreſentation. 321

Thus when evidence was offered to prove that a paper encloſed was always deemed a part of the policy, Lord *Mansfield* refuſed to hear it. *ibid*

A warranty written *in the margin* of the policy is conſidered to be equally binding, and liable to the ſame ſtrict conſtruction, as if written in the body of the policy. 322, 323

Words written tranſverſly on the policy were held to be a warranty. 322

Where it was ſaid *in the margin* that the ſhip ſailed from *Liverpool* with 50 *hands and upwards*, the court held this was a warranty, and as ſhe in fact ſailed from *Liverpool* with only 46, though ſhe had upwards of 50 hands from *Beaumaris*, which is within ſix hours ſail from *Liverpool*, the underwriters were diſcharged. 323

If a man warrant to ſail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer anſwerable. *Page* 325

This rule holds though the ſhip be delayed for the beſt and wiſeſt reaſons, or even though ſhe be detained by force. *ibid*

Thus where a ſhip was inſured at and from *Jamaica*, warranted to ſail on or before the 26th of *July*; it appeared that the ſhip was ready and would have ſailed on the 25th, *if ſhe had not been reſtrained by the order of Sir Baſil Keith, Governor of Jamaica, and detained beyond the day*. The inſurer was diſcharged. *ibid*

This rule is adopted by foreign writers. 326

If the warranty be to ſail *after* a ſpecific day, and the ſhip ſail before, the policy is equally avoided as in the former caſe. *ibid*

Upon a warranty to ſail on or before a particular day, if the ſhip ſail before the day from her port of loading, *with all her cargo and clearances on board*, to the uſual place of rendezvous at another part of the iſland, merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo, beyond the day. 327

But if her cargo was not complete, it would not be a commencement of the voyage. *ibid*

A ſhip being inſured at and from *Jamaica* to *London*, warranted to ſail on or before the 1ſt of *Auguſt*, was *completely laden* for her voyage to *England*, at *St. Ann's* in *Jamaica*, and ſailed from thence on the 26th of *July*, for *Bluefields*, in order to join the convoy there; but was detained by an embargo till the 6th of *Auguſt*. The court held that the ſailing from *St. Anne's*

Anne's was the commencement of the voyage. *Page* 328

When a ſhip leaves her port of loading, having a full and complete cargo on board, and having no other view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port. 331

The ſame doctrine was advanced, even though it was a condition inſerted in one of the ſhip's clearances, that *ſhe ſhould paſs by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. 332

Thus alſo an embargo was actually publiſhed, before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a proteſt, and knowingly ſent his ſhip into the embargo, yet, as he ſwore, that he believed the embargo would be immediately taken off, the underwriter was held liable. 337

If the inſured warrant that the veſſel ſhall depart with convoy, and it do not; the policy is defeated, and the underwriter is not reſponſible. 338

A convoy means a naval force under the the command of that perſon whom government may happen to appoint. 328, 341

Therefore where a ſhip put herſelf under the direction of a man of war till ſhe ſhould join the convoy, which had left the uſual place of rendezvous before ſhe arrived there; it was held not to be a departure with convoy, although ſhe, in fact, joined, and was loſt in a ſtorm. 349

Aliter, if ſuch ſhip was part of the convoy. 342

Q. Whether ſailing orders from the commander in chief to the particular ſhips are neceſſary to conſtitute a convoy. 341, 342

A convoy appointed by the Admiral, commanding in chief upon a ſtation abroad, is a convoy appointed by government. 343

A ſailing with convoy from the uſual place of rendezvous, as *Spithead* for the port of *London*, is a *departure* with convoy, within the meaning of ſuch a warranty. 343, 344

Although the words uſed generally are "to depart with convoy" or "to ſail with convoy," yet it extends to ſail with convoy throughout the voyage. 345

But an unforeſeen ſeparation from convoy is an accident to which the underwriter is liable. *Page* 347

So held where a ſhip was ſeparated from her convoy by ſtorm, prevented from rejoining it, and was loſt. 348

Even where the ſhip has, by tempeſtuous weather been prevented from joining the convoy, at leaſt, ſo as to receive the orders of the commander of the ſhips of war, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy. *ibid*

Otherwiſe, if the not joining be owing to the negligence and delay of the captain. 349

As where repeated ſignals for ſailing had been made the night before, and continued next day from 7 till 12; notwithſtanding which the ſhip inſured did not ſail till 2 hours after. *ibid*

If a man warrant the property to be neutral: and it is not, the policy is void *ab initio*. 350

In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral; it was expreſsly found by the jury that they were not neutral. The court therefore, though the loſs happened by ſtorms, and not by capture, declaredthat the contract was void. 350

If the ſhip and property are neutral at the time when the riſk commences, this is a ſufficient compliance with a warranty of neutrality. 351, 353

The inſurer takes upon himſelf the riſk of war and peace. 352

If the property be neutral at the time of ſailing, and a war break out the next day, the inſurer is liable. 353

As to the effect of the ſentence of a foreign court of Admiralty, upon the queſtion of neutrality, ſee Admiralty.

Of warranty in a life inſurance, ſee title lives.

Wiſbuy, Laws of.

An account of them. Introd. xxix

They mention inſurances. Introd. xxx

Witneſſes. See *Evidences.*

Wool. See *Prohibited goods.*

Wreck.

In caſes of wreck a *reaſonable* ſalvage ſhall be allowed to thoſe who ſave the ſhip or any of the goods, to be aſcertained by three juſtices of the peace. 132 to 138

Of felony in caſes of wreck, vide tit. *Felony.*

Written Clauſe.

The *written clauſe* in a policy will controul the printed words. 5

FINIS.